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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Independent Expert on human rights and international solidarity, Virginia Dandan

Summary

The Independent Expert on human rights and international solidarity, Virginia Dandan, submits the present report pursuant to Human Rights Council resolution 26/6. The report provides a summary of activities undertaken by the Independent Expert during the reporting period with the aim of raising awareness of the proposed draft declaration on the right of peoples and individuals to international solidarity in particular, and on promoting international solidarity in general.

The main feature of the present report is the conceptualization in human rights terms of international solidarity in the context of the proposed draft declaration. This is the first time that international solidarity is being examined in the light of the text of the proposed draft declaration on the right of peoples and individuals to international solidarity.

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I. Introduction

1. In its resolution 26/6, adopted at its twenty-sixth session, the Human Rights Council decided to extend the mandate of the Independent Expert on human rights and international solidarity, and noted with appreciation the proposed draft declaration on the right of peoples and individuals to international solidarity set out in the annex to her report (A/HRC/26/34). The Council also decided that, in order to obtain input from as many Member States as possible on the proposed draft declaration, the Independent Expert should convene regional consultations and/or workshops, and requested the Office of the United Nations High Commissioner to assist her in organizing those gatherings. In the same resolution, the Council also requested the Independent Expert to consolidate and consider the output from all the regional consultations; to submit to it, at its thirty-second session, a report on those consultations; and to submit to the Council and the General Assembly, before the end of her second term, a revised draft declaration.

2. In her report to the General Assembly at its 69th session (A/69/366), the Independent Expert explored the application of the provisions of the proposed draft declaration to the illustrative goals recommended by the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda, together with the sustainable development goals proposed by the Open Working Group of the General Assembly on Sustainable Development Goals. Her brief analysis was written with a view to contributing to the current process of formulating the future sustainable development goals to ensure that they are consistent with universal human rights standards, focusing on the value added to the goals when they are defined and informed by the right to international solidarity.

A. Activities undertaken during the reporting period

3. Pursuant to other requests reiterated by the Council in its resolution 26/6, the Independent Expert has continued to pursue her mandated activities. They include participation in relevant international forums and major events with a view to promoting the importance of human rights and international solidarity, particularly in the implementation of the Millennium Development Goals and the United Nations development agenda beyond 2015. The Independent Expert closely followed and actively participated in activities and initiatives relating to the post-2015 development process, including those relating to climate change, in various conferences and consultations at the international and regional levels.

4. In August 2014, she was invited to speak in the session entitled "Accountability and a renewed global partnership" during the Asia-Pacific Regional Consultation on Accountability for the Post-2015 Development Agenda, held at the United Nations Conference Centre in Bangkok. The expected output of the consultation was a set of recommendations on how global partnerships could be made more effective and accountable, and how such partnerships could benefit from regional platforms. During the discussions, the Independent Expert stressed that effective global partnerships in the context of the post-2015 development agenda should be grounded in human rights standards and that States' human rights accountability was already set forth in the international human rights treaties that they had ratified.

5. The Independent Expert also had an opportunity to highlight once again the need to integrate human rights throughout the sustainable development processes and outcomes when she was invited by the United Nations Economic and Social Commission for Asia and the Pacific to speak as a panellist at the Expert Group Meeting on Macroeconomic Prospects, Policy Challenges and Sustainable Development in Asia-Pacific, held in December 2014 in Bangkok. The expert group meeting brought together development

experts from the region and beyond to provide new regional perspectives for policy options which Asian and Pacific countries could adopt to meet their development objectives. The Independent Expert participated in discussions focused on the strategies needed to improve the economic, social and environmental aspects of economic growth that are simultaneously people-centred and inclusive, dynamic and resilient, and within the capacity of the earth and its resources; overcoming the fundamental barriers to the integration of the economic, social and environmental dimensions that support people-centred sustainable development; and the key steps required to turn trade-offs between the economic, social and environmental dimensions into synergies.

6. The Independent Expert attended the World Conference on Indigenous Peoples and the Climate Change Summit, which were held simultaneously during the opening week of the sixty-ninth session of the General Assembly, in September 2014, with a view to gathering more recent data relevant to the proposed draft declaration on the right to international solidarity. She was invited to participate in the Leaders' Forum on Women Leading the Way: Raising Ambition for Climate Action, an event hosted by UN-Women and the Mary Robinson Foundation – Climate Justice. Current and former women heads of State, representatives of governments, leaders of grassroots, youth and indigenous organizations, civil society, the private sector, the scientific community and the United Nations system were gathered together to demonstrate women's leadership on climate action and highlight gender-responsive action taken at both the local and national levels. The forum's outcomes were intended to feed into the Secretary-General's Climate Change Summit, which was aimed at mobilizing action by governments, business, the financial sector and civil society to enable the world to shift towards a low-carbon economy.

7. In November 2014, the Independent Expert, at the invitation of the Association of Southeast Asian Nations (ASEAN) Intergovernmental Commission on Human Rights, participated as a speaker and resource person during the Commission's workshop on the theme "Regional mechanisms: "best practices on implementation of human rights", which was held with a view to creating a platform for exchanging and sharing experiences, best practices and lessons learned among representatives of regional human rights mechanisms around the globe and other relevant stakeholders, including representatives of government agencies, national human rights institutions, United Nations agencies and civil society organizations. The workshop was convened with a view also to enhancing and regularizing cooperation between the Commission, other regional mechanisms and other stakeholders for the better promotion and protection of human rights in the ASEAN subregion, which was to be integrated into a single economic community by the end of 2015. During the discussions, the Independent Expert spoke on experiences and challenges in developing and implementing regional norms, standards or instruments and on the way forward for cooperation between the regional mechanisms and the United Nations agencies and treaty bodies.

B. Context of the present report

8. At recent events in various parts of the world, opposing interest groups have been using the term "solidarity" loosely, rendering the term and, by association, the concept of "international solidarity" vaguer or more ambiguous than they already are. This ambiguity gives rise to the need to limit the possible interpretations of the term that may be applied on the various occasions when the term may be used In the present report, the Independent Expert discusses how the term "international solidarity" as a principle underpinning international law should be understood in the context of the proposed draft declaration on

the right of peoples and individuals to international solidarity. In the preamble to the proposed draft declaration, the Independent Expert defines and clarifies the concept of international solidarity,[1] its value and significance. Although reviews of international solidarity has been undertaken in the past, including by the present mandate holder's predecessor, this is the first time that international solidarity has been examined with reference to the text of the proposed draft declaration on the right of peoples and individuals to international solidarity.[2] In that it expounds the concept of international solidarity, the present report will also be of use for the series of regional consultations being held in 2015 as mandated by the Human Rights Council in resolution 26/6.

9. It is not the intention of the Independent Expert in the present report to trace the historical pathways that international solidarity has taken over the decades since the term was first used in a socialist context in the 1890s. Instead, she focuses on the concept of international solidarity in human rights terms, in line with the mandate on human rights and international solidarity established by the Commission on Human Rights, the predecessor of the Human Rights Council.

10. In the present report, the Independent Expert responds to issues around the question as to what international solidarity is and what it is not, in the context of the proposed draft declaration. In view of the limitations on the length of the present report, the core features of international solidarity—preventive solidarity and international cooperation—will be discussed further in subsequent reports. The proposed draft declaration on the right of peoples and individuals to international solidarity itself will be closely and critically analysed in the forthcoming series of regional consultation workshops to be convened in 2015 and early 2016, and the outcome will be described in the Independent Expert's subsequent reports.

II. Human rights and international solidarity

A. Attributes of international solidarity

11. The principle of solidarity has been given prominent attention in international law, notably in the writings of Karel Wellens, in which it was analyzed in the light of the "common responsibilities of States, international organizations, peoples and nations, and civil society."[3] It has been said and rightly so, that the principle of solidarity is a concept that progressively moves forward in asserting common rights and responsibilities and in the shaping of an international community, representing values to be attached, as a whole, to the life of present and future generations, and to the development of a democratic and equitable international order.[4]

12. When she first took up her mandate, the present Independent Expert spoke of solidarity as a persuasion that combines differences and opposites, holding them together in

[1] See final paper on human rights and international solidarity, prepared by Chen Siqiu on behalf of the drafting group on human rights and international solidarity of the Human Rights Council Advisory Committee (A/HRC/21/66), paras. 11–14.

[2] See A/HRC/26/34, annex, for the full text of the proposed draft declaration on the right of peoples and individuals to international solidarity.

[3] T. Van Boven, "The right to peace as an emerging solidarity right", in *Evolving Principles of International Law* (Leiden, Martinus Nijhoff Publishers, 2012), p. 137.

[4] Ibid., p. 138.

one heterogeneous whole, imbuing that whole with the universal values of human rights.[5] She continues to maintain that solidarity is a positive force in the lives of people and nations and that it should be protected from exploitation and corruption, most importantly at the international level, across national boundaries and cultural diversities. International solidarity should be explicitly linked with human rights if it is to be true to the purposes of the United Nations, and if it is to be the engine that will drive the international community's collective actions to overcome the common challenges, risks and threats faced by nations and peoples and achieve the transformative changes that are imperative in these troubled times.

13. The proposed draft declaration provides that international solidarity shall be understood as the convergence of interests, purposes and actions between and among peoples, individuals, States and their international organizations to achieve the common goals that require international cooperation and collective action in order to foster peace and security, development and human rights. This requires that States respect the human rights standards set forth in the international human rights treaties that they have ratified, and comply with their existing treaty obligations. It also implies that non-State actors should be guided in their activities by codes of conduct to prevent harm. International solidarity carries with it the precondition of compliance with duties and obligations for actors who come together to act collectively. International solidarity should not therefore be misconstrued as relating in any way to collective action by States that result in the contravention of any of the international human rights treaties to which they are parties. Nor is international solidarity related to any form of collective action undertaken by non-State actors the outcome of which may be, for example, to cause or perpetuate inequality, discrimination and exclusion among or between the individuals, groups and peoples with whom they work.

14. The Independent Expert holds the view that, given the disturbing conflicts and discord ongoing in many parts of the world, it is important to reconsider whether and how solidarity is indeed advancing rights and responsibilities as it influences the shaping of the international community. The time is appropriate, while the proposed draft declaration is still in the form of a proposal, to identify and rethink the attributes of international solidarity in human rights terms, a facet that is often neglected or ignored. There is a need to re-examine the issues that persist around international solidarity, this time taking fully into account the new dynamics that are rapidly changing the present global realities. The challenges that confront the world today cannot be addressed using the previous perspectives, which may no longer be relevant or applicable. The Independent Expert reiterates what she has pointed out a number of times in the past: that international cooperation is a key mechanism for international solidarity, but that international cooperation is not the same as international solidarity. In the report on the enhancement of international cooperation in the field of human rights prepared by the Human Rights Council Advisory Committee, a definition of international cooperation is not given but merely implied, with a detailed description of its practice and conceptual ramifications. For example, the report quotes the following text from the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations: "States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare

[5] V. Dandan, as cited by S. Puvimanasinghe in "Understanding the right to development" in *Realizing the Right to Development* (Geneva, United Nations, 2013) p. 205.

of nations and international co-operation free from discrimination based on such differences (A/HRC/AC/8/3, para. 12)."

15. The proposed draft declaration defines international solidarity as a much broader principle, encompassing a comprehensive and coherent conceptual and operational framework to regulate a spectrum of global governance issues beyond the more limited instances of international cooperation in the development field. For example, international solidarity requires the deployment of preventive solidarity aimed at proactively preventing and removing the root causes of inequalities between developed and developing countries, as well as the structural obstacles that generate poverty. International solidarity represents a multi-directional—rather than a one-way—deployment of action, together with the corresponding obligation and accountability, thus creating a nexus of intersecting elements that would bring about an enabling environment where human rights can be exercised and enjoyed by individuals, groups and peoples.

16. International solidarity is a foundational principle underpinning the three pillars of the Charter of the United Nations : peace and security, development and human rights. The Charter distinctly reaffirms faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small. The Charter is a testimony to the determination of States to establish the conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained; to promote social progress and better standards of life in greater freedom; and to employ international machinery for the promotion of the economic and social advancement of all peoples.[6] Accordingly, international solidarity should be understood within the context of the conditions that States are bound to maintain, and not otherwise. The Charter of the United Nations needs to be revisited as often as necessary, as a reminder of its timeless vision, given the evolving needs of a changing world. Article 1 of the Charter, articulating the purposes of the Organization, implicitly calls for international solidarity to undertake effective collective measures for the prevention and removal of threats to peace. Article 1 also calls for international cooperation in solving international problems of an economic, social, cultural or humanitarian character, through international cooperation. The Independent Expert interprets this article as consistent with the view that international cooperation is a key mechanism of international solidarity.

17. The Universal Declaration of Human Rights recognizes the equal and inalienable rights of all members of the human family (preamble), and asserts that all human beings are born free and equal in dignity and rights and that everyone is entitled to a social and international order in which rights and freedoms can be fully realized (art. 28). The civil, political, economic, social and cultural rights that are enshrined in the Declaration have been codified in various international human rights instruments which the majority of States have ratified. The Declaration and international solidarity are mutually reinforcing since, while the Declaration is one of the pillars upon which international solidarity is built, international solidarity has been, throughout the history of the modern human rights movement, among the most powerful and essential tools of advocates and activists seeking to advance the vision embodied in the Declaration (see A/HRC/21/44/Add.1, para. 4).

18. A number of articles in the Declaration are of particular relevance to international solidarity, such as article 1, which provides that all human beings "are endowed with reason and conscience and should act towards one another in a spirit of brotherhood"; article 22, which provides that as a member of society, everyone is entitled to the realization "through national effort and international cooperation and in accordance with the organization and

[6] Charter of the United Nations, preamble.

resources of each State, of the economic, social and cultural rights indispensable for his (the person's) dignity and the free development of his personality"; article 27, which provides that everyone has the right "freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits"; and article 29, which provides that everyone "has duties to the community in which alone the free and full development of his personality is possible". The preamble and the above-mentioned articles of the Declaration shape the contours of international solidarity as both a principle and a right of peoples and individuals. They also reinforce the idea of international solidarity as an instrument that responds to the existing imperative to establish the conditions under which all individuals and peoples can enjoy and realize their human rights. It is in addition the engine for international assistance and cooperation towards the effective implementation of sustainable development.

19. While international solidarity has instrumental value, it is also an end in itself. It is instrumental in that it draws attention to interdependency and the need for collective action, but is at the same time a guide for the collective action of States towards the desired outcome of international solidarity for the full realization of all human rights (A/HRC/21/44/Add.1, para. 20). This is consistent with the affirmation by the Human Rights Council that international solidarity is not limited to international assistance and cooperation, aid or humanitarian assistance; that it includes sustainability in international relations, especially international economic relations, the peaceful coexistence of all members of the international community, equal partnerships and the equitable sharing of benefits and burdens (resolution 18/5, para. 2). The Council's statement implicitly refers to international solidarity as a foundation of the three pillars of the United Nations: peace and security, development and human rights.

B. International solidarity in action

20. International solidarity recognizes that collective action affecting human rights is not limited to activities undertaken by governments and international organizations alone. Such action also includes that by non-State actors, such as civil society and its organizations, acting in the civil, political, economic, social or cultural fields, whether in the international arena or within the internal processes of their societies. International solidarity requires that human rights standards should guide the policies and practices of State and of non-State actors alike when these affect the individuals, groups and peoples, within or outside their territories.[7] The paragraphs that follow provide a few examples that illustrate international solidarity as practised among States and non-State actors.

21. It has been observed that the overwhelming expression of international solidarity by States[8] is apparent not only in the adoption of the Universal Declaration of Human Rights in 1948 but also in the multitude of commitments and pledges relating to human rights and development to which States have agreed, such as the Declaration on the Right to Development in 1986, the Vienna Declaration and Programme of Action in 1993, the Copenhagen Declaration and Programme of Action on Social Development in 1995, the Beijing Declaration and Platform of Action in 1995 and the Millennium Declaration in 2000, not to mention the numerous declarations and decisions that have been agreed upon in various United Nations international conferences and regional summits. International solidarity is manifested among States when their collective action has a positive impact on

[7] C. Beitz, "Human rights as a common concern", in *The American Political Science Review*, Vol. 95, No. 2 (June, 2001), p. 277.

[8] See Human Rights Council resolution 15/13, para. 8.

the exercise and enjoyment of human rights by peoples and individuals within and outside their respective territories upon the actual implementation of the commitments and decisions made between and among them at the regional and international levels. International solidarity permeates the vision and purposes of the various United Nations specialized agencies, and is reflected in their programmes and activities. More importantly, the outcomes of such programmes and activities substantiate their impact on the ground.

22. International solidarity is just as evident on the part of peoples, groups, and civil society and their organizations, which establish forums and platforms domestically and transnationally at which actors in different situations and geographical locations can peacefully share, discuss and disseminate information, interact with each other, negotiate—formally or informally—and advance their social, cultural and political interests in order to foster respect for, and protection and fulfilment of, all human rights on the basis of equality and non-discrimination. The work of non-State actors becomes even more significant and productive when they complement the efforts of States through their own activities. The initiatives around the Millennium Development Goals are a notable example. Since the Goals were adopted in 2000, governments, international agencies and civil society organizations worldwide have worked together and contributed to remarkable achievements. Although much more needs to be done, there are now half a billion fewer people living in extreme poverty; the lives of about 3 million children have been saved each year; four out of five children are now vaccinated for a range of diseases; maternal mortality is now receiving the focused attention it deserves; deaths from malaria have fallen by one quarter; contracting HIV no longer constitutes a death sentence; and, in 2011, a record 590 million children in developing countries attended primary school.[9]

23. The Global Forum for Migration and Development is arguably the world's foremost dialogue opportunity for civil society organizations and governments to discuss international migration and development at the international level. The Forum was established in Brussels in 2007 and is a State-led voluntary process outside the United Nations system at which policymakers and stakeholders from countries all over the world participate in meetings, notably the annual meetings, to discuss the relationship between migration and development, share experiences and forge practical cooperation. Although State-led, civil society has been directly engaged in the Forum from the beginning. At its annual meeting, the Forum produces a number of recommendations for governments to pursue, including those put forward by civil society during the Civil Society Days, prior to the government meeting.[10] The Platform for Partnership, a feature of the Forum, is an online initiative that highlights government policies and practices that have been inspired by recommendations from civil society. The online platform facilitates the dissemination of information, communication and exchanges between stakeholders, who share their experiences and the outcomes of migration and development projects that have emerged from the recommendations and that they have adapted to their own situations.

24. International solidarity has enduring significance in the conduct of international affairs and is critical in ensuring that global challenges such as epidemics and public health crises are approached and managed in such a way that the burdens and the financial responsibilities are distributed fairly, in accordance with the principles of equity and social justice. The alarming spread of HIV/AIDS has challenged the development, progress and stability of societies, calling for a exceptional and comprehensive global response.[11] The crisis has united the international community in an unprecedented manner: few other

[9] United Nations, *A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development* (2013).

[10] See http://gfmdcivilsociety.org.

[11] See Security Council resolution 1983 (2011).

challenges have generated a similar set of reactions.[12] Multiple stakeholders and partners, including the United Nations, governments and civil society organizations, have laboured, and continue to do so, in a spirit of shared and global responsibility, to combat the epidemic. The disease spurred local initiatives for the protection of the human rights of the most vulnerable and disadvantaged peoples and prompted remarkable international solidarity between the global north and the global south.[13]

25. The challenges that arise from epidemics such as HIV/AIDS demand that peoples, nations and the international community tackle governance differently, to yield positive outcomes, while at the same time taking fully into account respect for, and protection of, human rights. The nature of the disease and the scale of the epidemic have spurred governments and local people to be more responsible and resourceful in governing themselves in order to ensure that national priorities are aligned with shared international commitments, not only to combat HIV/AIDS but also to promote health, development and human rights. In 1987, the World Health Organization (WHO) took on the lead responsibility for AIDS in the United Nations and set up the Special Programme on AIDS, which subsequently became the Global Programme on AIDS. In response, an unprecedented 160 countries rapidly set up national programmes to combat HIV/AIDS.[14] As a national priority in the worst affected countries, the programmes for the treatment of the disease were expanded to include prevention, along with social support for affected groups down to the community level. It was at that point that the direct repercussions of AIDS on social, cultural and economic development became apparent. HIV/AIDS was not simply a disease but a social and economic handicap that hindered development. The need for a broader response at the international level led to the creation in 1995 of the Joint United Nations Programme on HIV and AIDS (UNAIDS), whose establishment was coordinated by WHO. UNAIDS has been in operation since 1996 and coordinates the efforts of the United Nations family of agencies and organizations. It spearheads global action to help the world prevent new HIV infections, care for people living with HIV and mitigate the impact of the epidemic.[15]

26. UNAIDS is tasked with putting together the global response to an epidemic of a dreaded and highly stigmatizing disease, whose ramifications affect all human rights and extend across virtually all aspects of society.[16] The International Guidelines on HIV/AIDS and Human Rights, first developed in 1998 by UNAIDS and the Office of the United Nations High Commissioner for Human Rights, are a tool for States to use in designing, coordinating and implementing effective national HIV/AIDS policies and strategies. As a human rights-based response to HIV/AIDS, the Guidelines rely on broad approaches such as support and increased private sector and community participation to respond ethically and effectively to HIV/AIDS.[17] However, there are still no data regarding the implementation of the guidelines and their effectiveness in achieving expected outcomes. Global AIDS Response Progress Reporting provides in-depth information on collating data and undertaking subsequent global AIDS response progress reporting. The collection and

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[12] See UNAIDS, *AIDS at 30: Nations at the crossroads*, available from www.unaids.org/sites/default/files/media_asset/aids-at-30_1.pdf.

[13] Ibid**Error! Hyperlink reference not valid.**.

[14] M Carael, Twenty Years of Intervention and Controversy, 2006 Available from http://rds.refer.sn/IMG/pdf/06CARAEL.pdf.

[15] See www.un.org/ga/aids/ungassfactsheets/html/FSUNworks_en.html.

[16] See data.unaids.org/pub/Report/2008/JC1579_First_10_years_en.pdf.

[17] See www.ohchr.org/EN/Issues/HIV/Pages/InternationalGuidelines.aspx.

reporting of high-quality results on the AIDS response are crucial components of the UNAIDS plan for continued mutual responsibility and international solidarity.[18]

27. During the period from 1996 to 2012, global investments for a concerted AIDS response increased from US$ 300 million to about US$ 15 billion. Those considerable financial contributions substantiated the political declarations that had been made and resulted in impressive returns – from a global increase in access to prevention and treatment to significant declines in new infections and in AIDS-related fatalities. Similarly, the Global Fund to Fight AIDS , Tuberculosis and Malaria caused a drop in the price of anti-retroviral drugs and set the conditions for fixing the prices of pharmaceuticals.[19] Commitments by donors both large and small, national investments by States, the significant impact of the Global Fund and initiatives such as the United States President's Emergency Plan for AIDS Relief have proved crucial in tackling the urgent need for sustained funding.[20] Political entities and policymakers also rose to the occasion, discussing and making crucial decisions regarding the issue in relation to finance and debt.[21] The funds raised from cancellation of debt or debt relief have assisted countries in their efforts to combat HIV/AIDS and to implement poverty reduction programmes.[22]

C. Building on international solidarity

28. International solidarity, in the true sense of the term, should inform the new opportunities for economic growth and the development of the world economy that have been brought about by globalization but that have, however, also been accompanied by a widening gap between developed and developing countries, widespread poverty and inequality including gender inequality, unemployment, social erosion and environmental risks. The ongoing globalization of trade and capital contributes to the interconnectedness and interdependence of individuals and States, presenting challenges that demand increased coordination and collective decision-making at the global level. It is in this area that international solidarity can deploy international cooperation to promote a global enabling environment that should not be limited to the promotion of economic growth through unchecked trade liberalization and free movement of capital. Instead, international cooperation should actively promote a multilateral trading and investment system that is conducive to the realization of all human rights. Establishment of a fair, inclusive and rights-based international trade and investment regime requires that all States, acting in solidarity and pursuant to their common but differentiated responsibilities, recognize their obligations to ensure that no international trade agreement or policy to which they are party adversely impacts upon the protection and promotion of human rights inside or outside of their borders. The notion of international obligations becomes even more relevant in the present context of globalization, where the role of the State is increasingly being reduced, inadvertently in some cases, it might be argued. Whether or not this is the case, the State's capacity to respect, protect and fulfil human rights is diminished. In such a context, the value of international cooperation, a key feature of international solidarity, takes on even more importance, particularly in connection with supporting a State that needs assistance in complying with its core human rights obligations. Collective action by States in

[18] UNAIDS, *Global AIDS Response Progress Reporting 2015*, p. 4.
[19] See UNAIDS, *Aids at 30: Nations at the Crossroads* (footnote 18).
[20] See www.unaids.org/sites/default/files/media_asset/UNAIDS_2012_LetterToPartners_en_1.pdf.
[21] See UNAIDS, *Aids at 30: Nations at the Crossroads* (footnote 18).
[22] See www.prb.org/Publications/Articles/2002/TheInternationalResponsetoHIVAIDS.aspx.

undertaking measures of reactive solidarity, as well as preventive solidarity,[23] are of critical importance in minimizing adverse impacts on the exercise and enjoyment of human rights.

29. During the Millennium Summit in 2000, States resolved to, inter alia, promote gender equality and the empowerment of women as effective ways to combat poverty, hunger and disease and to stimulate development that is truly sustainable; to combat all forms of violence against women; and to implement the Convention on the Elimination of All Forms of Discrimination against Women.[24] Eradication of poverty based on sustained economic growth, social development, environmental protection and social justice requires the involvement of women in economic and social development, and equal opportunities and the full and equal participation of women and men as agents of, and not just as the beneficiaries of, people-centred sustainable development (Beijing Declaration, para. 16). The General Assembly, in its resolution 66/216 on women and development, recognized the mutually reinforcing links between gender equality and poverty eradication, and the achievement of all of the Millennium Development Goals, as well as the need to elaborate and implement, where appropriate, in consultation with all relevant stakeholders, comprehensive gender-sensitive poverty eradication strategies to address social, structural and macroeconomic issues. In paragraph 10 of resolution 66/216, the General Assembly urged the donor community, Member States, international organizations including the United Nations, the private sector, non-governmental organizations, trade unions and other stakeholders to strengthen the focus and impact of development assistance, targeting gender equality and the empowerment of women and girls through gender mainstreaming, the funding of targeted activities and enhanced dialogue between donors and partners, and also to strengthen the mechanisms needed to measure effectively the resources allocated to incorporating gender perspectives in all areas of development assistance. The resolution brings to the fore the need for international solidarity between States that enter into international cooperation, which should be based on equal partnerships and mutual commitments and obligations taking into account the best interests of the constituents in their jurisdictions, on the basis of equality and non-discrimination, in accordance with international human rights principles and standards.

30. The Social Protection Floor Initiative (SPF Initiative), established in 2009 by a coalition of United Nations agencies and development partners extending beyond the United Nations, promotes universal access to social transfers and services as a means of reducing poverty and inequality. It is predicated on the results of various studies showing that a basic floor of social transfers is affordable in all countries at all stages of economic development, although the least developed countries may need initial assistance from the donor community.[25] The initiative transcends the mandate of any individual United Nations agency, and it is logical therefore that it is being implemented through a coherent, system-wide approach. The optimal use of experts, resources and logistical support is ensured through joint United Nations country responses, with each United Nations agency contributing to the initiative in its respective area of expertise. This system of operations is a collective endeavour aimed at a common outcome that will impact on the realization of human rights.

31. The social protection floor consists of a basic set of transfers, either in cash or in kind, to provide a minimum income and livelihood security for all; and the supply of an essential level of goods and social services such as health, water and sanitation, education,

[23] Preventive solidarity is another key feature of international solidarity, with reactive solidarity its other side. The key features of international solidarity will be discussed in a forthcoming report.

[24] General Assembly resolution 55/2 on the United Nations Millennium Declaration.

[25] See http://www.ilo.org/secsoc/information-resources/publications-and-tools/Workingpapers/lang--en/index.htm.

food, housing, and life and asset-saving information, accessible to all. The SPF Initiative emphasizes the need to guarantee services and transfers across the life cycle, from children to the economically active but with insufficient income, to older persons, paying particular attention to vulnerable groups, including people living with HIV/AIDS, migrants and populations exposed and highly sensitive to adverse external factors such as natural hazards, extreme weather events and other climate phenomena. The initiative also takes into account key characteristics that cut across all age groups, including gender, socioeconomic status, ethnicity and disability.[26]

32. In June 2012, at its 101st session, the International Labour Conference adopted, by an impressive tripartite consensus, International Labour Organization (ILO) recommendation No. 202 (2012) concerning national floors of social protection. The recommendation established a new international labour standard, calling for a basic social protection floor for all through the provision of health care and income security. In adopting its recommendation No. 202, the ILO General Conference recognized the importance of social security in preventing and reducing poverty, inequality and social exclusion, and the role of social security systems as automatic stabilizers in times of crisis. The recommendation provides guidance to States on establishing and maintaining social protection floors as a fundamental element of their national social security systems. Social Floor Protection Initiative processes are country-driven, consultative, inclusive and participatory in nature, involving all stakeholders, including government representatives from the relevant agencies, social partners, parliamentarians and civil society through social dialogue.

33. The expansion of social protection has proved to be important in reducing inequality and poverty in a range of national contexts in both developing and developed countries. According to recent reports, some 30 developing countries have already taken measures to introduce elements of a social protection floor. Their experiences have shown that social security schemes are a vital and flexible policy tool to counteract and soften the social and economic consequences of financial shocks. They have also demonstrated the feasibility of building social protection floors and that, with the necessary political will, adequate resources for capacity-building and a sound implementation process, a strong national consensus in favour of social protection floor policies can be created and developed.[27] The Social Protection Floor Initiative is a way for people to earn sufficient income for adequate food, housing, water and sanitation, education and good health. It also paves the way for people to take part in cultural life, exercise their freedom of expression and share knowledge and ideas, all human rights to which everyone is entitled. The SPF Initiative contributes to more stable, fairer and cohesive societies by making those rights available and more accessible. At the same time, it strengthens the capacity of States to comply with their obligations to respect, protect and fulfil human rights, which is a defining attribute of international solidarity.

34. The International Conference on Financing for Development, held in Mexico in March 2002, was hailed as an exceptional event, different from other United Nations conferences, primarily because of the inclusion of all the stakeholders in the constructive interaction between developed and developing countries, and also because it was free from hostilities between the rich and the poor countries, which at that time was considered remarkable.[28] The outcome document, known as the Monterrey Consensus, was a blueprint

[26] International Labour Organization and WHO, Social Protection Floor Initiatives (2010), p. 3.

[27] A/HRC/28/68, p. 4.

[28] I Haque and R. Burdescu, "Monterrey Consensus on Financing for Development: response sought from international economic law", in *Boston College International & Comparative Law Review*, Vol. 27, p. 219 (2004). Available from http://lawdigitalcommons.bc.edu/iclr/vol27/iss2/4/.

for a new partnership that focused for the most part on a shared responsibility between developed and developing countries, based on the recognition that each country had "primary responsibility for its own economic and social development", stressing the role of national policies and development strategies and putting forward a renewed commitment by the international community to support its efforts.[29] The Monterrey Consensus did not constitute an end point but marked the beginning of an important process stemming from the resolve of States and other stakeholders to build an alliance for development and "act together". It was during the conference that it was decided that donor countries should commit to allocating 0.7 per cent of their gross national income to official development assistance.[30]

35. The period beginning in 2000 has been defined by the aid effectiveness agenda. What started as a small gathering of major Organisation for Economic Co-operation and Development (OECD) donors in the early 2000s grew to an unprecedented gathering of developed and developing countries, and international and regional civil society. The global landscape changed during this period, economically, politically and socially. The lines between developed and developing countries have blurred, and new forms of cooperation have emerged. In the years that followed the adoption of the Monterrey Consensus in 2002, four high-level forums on aid effectiveness were convened by OECD: in Rome in 2003, Paris in 2005, Accra in 2008 and, most recently, in Busan, Republic of Korea, in 2011. Busan was the venue for the Fourth High Level Forum on Aid Effectiveness, at which over three thousand delegates met to review progress on implementing the principles of the Paris Declaration on Aid Effectiveness and discuss how to maintain the relevance of the aid effectiveness agenda in the context of the evolving development landscape. The forum culminated in the signing of the Busan Partnership for Effective Development Cooperation by ministers from developed and developing countries, emerging economies and providers of South-South and triangular cooperation. For the first time in the history of the High Level Forum, a civil society representative took part in the actual negotiating process, marking a critical turning point in development cooperation and international solidarity, particularly where the language of the partnership emphasized the link between fighting poverty and protecting human rights.[31]

36. A new chapter in the history of international cooperation was initiated in Busan, where the focus shifted from aid effectiveness to the broader concept of development effectiveness. Through the inclusion of a diverse range of development stakeholders – donor governments from the North and the South, the private sector, civil society organizations, parliamentarians and local authorities, inter alia – the Busan Partnership for Effective Development Cooperation provided a more realistic framework for improving the way cooperation is implemented on the ground and how it works with other drivers of development. For civil society organizations, Busan was a particularly significant milestone, as it marked the first time that civil society had participated as a full and equal stakeholder in aid effectiveness negotiations alongside governments and donors. It was thus a unique opportunity to influence development cooperation for people's organizations, and also strengthened the shift from a technical aid effectiveness approach to development effectiveness based on long-term sustainability, addressing the root causes of poverty and the realization of human rights.[32]

[29] See Report of the International Conference on Financing for Development, Monterrey, Mexico, 18–22 March 2002 (A/CONF.198/11), chap. I, resolution 1, annex.

[30] Ibid.

[31] See www.oecd.org/dac/effectiveness/busanpartnership.htm.

[32] See http://cso-effectiveness.org/4th-high-level-forum-on-aid,080.

37. "The Future We Want",[33] the outcome document of the United Nations Conference on Sustainable Development, held in Rio de Janeiro, Brazil in 2012, encompasses a broad range of issues and outlines an agenda for the future, representing the common vision of States with the full participation of civil society. In it, the Heads of State and Government who attended the Conference recognize that eradicating poverty is the "greatest global challenge facing the world today" and commit themselves to freeing humanity from poverty and hunger "as a matter of urgency."[34] The contents of the outcome document are summarized thus:

> We recognize that poverty eradication, changing unsustainable and promoting sustainable patterns of consumption and production and protecting and managing the natural resource base of economic and social development are the overarching objectives of, and essential requirements for, sustainable development. We also reaffirm the need to achieve sustainable development by promoting sustained, inclusive and equitable economic growth, creating greater opportunities for all, reducing inequalities, raising basic standards of living, fostering equitable development and inclusion, and promoting integrated and sustainable management of natural resources and ecosystems that supports, inter alia, economic, social and human development while facilitating ecosystem conservation, regeneration and restoration and resilience in the face of new and emerging challenges.[35]
>
> We reaffirm the importance of international human rights instruments and international law. We emphasize the responsibilities of all States, in accordance with the Charter , to respect, protect and promote human rights and fundamental freedoms for all without distinction;[36] We reaffirm our commitment to strengthen international cooperation to address the persistent challenges related to sustainable development for all, in particular in developing countries, ... the need to achieve economic stability, sustained economic growth, the promotion of social equity and the protection of the environment, while enhancing gender equality, the empowerment of women and equal opportunities for all, and the protection, survival and development of children to their full potential, including through education.[37]

38. The avowed commitment of States to strengthening international cooperation to address the "persistent challenges" to sustainable development cannot be overemphasized, as it implies that they must be true to that pledge. It should also be emphasized that States stressed that sustainable development required concrete and urgent action, and that sustainable development could "only be achieved with a broad alliance of people, government, civil society and the private sector, all working together to secure the future we want for present and future generations".[38] Those words, together with those in the preceding paragraph, effectively define international solidarity. Another report, entitled "A new global partnership: eradicate poverty and transform economies through sustainable development",[39] contains the recommendations of the High Level Panel of Eminent Persons

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[33] General Assembly resolution 66/288, annex

[34] Ibid., para. 2

[35] Ibid., para. 4

[36] Ibid., para. 9

[37] Ibid., para. 11

[38] Ibid., para. 13

[39] See the report of the Independent Expert on human rights and international solidarity (A/69/366), in which the Independent Expert seeks to contribute to the process of formulating the future sustainable development goals to ensure that they are consistent with universal human rights standards, focusing on the value added to those goals when they are defined and informed by the right to international solidarity.

on the Post-2015 Development Agenda,[40] envisioning a universal agenda driven by "five big transformative shifts", describing the fifth as "the most important transformative shift towards a new spirit of solidarity, cooperation and mutual accountability that must underpin the post-2015 agenda", namely, leave no one behind; put sustainable development at the core; transform economies for jobs and inclusive growth; build peace and effective, open and accountable institutions for all; and forge a new global partnership.[41]

III. Conclusion

39. **In 2015, two important international agreements to be decided upon by States will affect the future of human development. One is a new set of sustainable development goals to take over from and continue the Millennium Development Goals, which expire at the end of 2015. The other is the outcome of the Conference of Parties to the United Nations Framework Convention on Climate Change, the primary international intergovernmental forum for negotiating the global response to climate change. The Conference is crucial because it must produce an international climate agreement for adoption in December 2015. The new agreement will limit global warming to the 2-degrees Celsius target, requiring a commitment from each government to indicate targets for reducing the levels of carbon emissions. Funding for those efforts will also be pledged at the Conference. The binding agreement will apply to all countries and will be implemented in 2020.**

40. **The lead-up to the Conferenceand the United Nations summit for the adoption of the post-2015 development agenda has been closely monitored by stakeholders and advocates who have been continuously calling for human rights to be at the forefront of the negotiations and to be integrated into the final agreements. The United Nations conferences at which States have pledged their commitments to goals and objectives that entail action at the national, regional or international level, are much too numerous to mention in the present report. Furthermore, information on the actual implementation of such pledges and their outcomes is very difficult to obtain, perhaps because of the paucity of action taken. The Independent Expert reiterates that international solidarity cannot be inferred merely from collective decisions or commitments agreed upon between State and non-State entities, until such time as those agreements are acted upon. But the integration of human rights into such agreements will indicate the path leading to the desired outcome of international solidarity.**

41. **The claim is not that genuine international solidarity as described above, nor international solidarity in general, is a magic formula for achieving desired outcomes. Rather, the Independent Expert suggests that international solidarity is a powerful tool for addressing key global challenges to human rights. In the context of the sustainable development goals and the climate agreement to be forged in 2015, international solidarity as described in the present report would ensure a fair and just relationship between State and non-State actors engaged in the pursuit of common goals or in overcoming a common challenge, in full cognizance of the human rights of the peoples, individuals and groups concerned. This resonates with the view of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda: "This is**

[40] Ibid.

[41] United Nations, *A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development. Report of the High-level Panel of Eminent Persons on the Post-2015 Development Agenda* (United Nations publication, Sales No. E.13.I.10).

a world of challenges, but these challenges can also present opportunities, if they kindle a new spirit of solidarity, mutual respect and mutual benefit, based on our common humanity and the Rio principles."[42] The need is greater than ever before for States and non-State actors to come together and undertake collective action in solidarity, whatever the outcomes of the two international agreements.

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[42] Ibid., p. 4

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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the human rights of migrants, François Crépeau

Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants*

Summary

The deaths of migrants in the central Mediterranean Sea have vividly and visibly demonstrated the continued importance of the issue of European Union border management in relation to the human rights of migrants. The present report follows the analysis of European Union border control presented to the Human Rights Council in 2013. It will address persistent human rights concerns and examine the long-term feasibility of the European Union's overall migration policy and the application of the Union's founding values and regional human rights standards in relation to integration and diversity.

* The report is circulated in all official languages. The annex to the report is circulated in the language of submission only.

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I. Introduction

1. The present report is submitted pursuant to Human Rights Council resolution 17/12. It outlines the activities of the Special Rapporteur on the human rights of migrants from 1 April 2013 to 31 March 2014. The thematic section is dedicated to European Union border management and the human rights of migrants.

II. Activities carried out by the Special Rapporteur

A. Participation in consultations and conferences

2. In November 2014, the Special Rapporteur organized an international consultation on recruitment practices and migrant workers at which a thorough and dynamic dialogue was held about key issues, barriers and policy options. The findings will be included in the 2015 report of the Special Rapporteur to the General Assembly.

3. In addition, the Special Rapporteur contributed to a number of international and regional dialogues and conferences, including the annual conference on migrants' rights of the European Union Agency for Fundamental Rights, and the seventh dialogue on protection of the Office of the United Nations High Commissioner for Refugees (UNHCR), on the theme "Protection at sea".

B. Country visits

4. Having found that the 1.8 million Sri Lankans working abroad face many human rights abuses, the Special Rapporteur visited Sri Lanka from 19 to 26 May 2014. He recommended that the Government take a range of measures, including bilateral agreements with countries of destination, the abolishment of recruitment fees for migrants and the full implementation of the code of ethical conduct for private agencies.

5. The Special Rapporteur visited Italy from 2 to 6 December 2014. He found that, despite a challenging economic and political climate, Italy has taken bold initiatives to address the unprecedented number of migrants and asylum seekers arriving by boat. He stressed that European Union member States must collectively support front-line States to provide a sustainable response that fully respects the human rights of migrants.

6. The Special Rapporteur visited Malta from 6 to 10 December 2014. Following that visit, he said that Malta must expect continued growth in the unprecedented number of migrants and asylum seekers arriving by boat and develop programmes to cope.

C. European Union follow-up

7. The visits to Italy and Malta were complemented by a visit to the European Union in Brussels, as part of a follow-up to the Special Rapporteur's 2012 year-long study on the management of the external borders of the Union. In 2013, the Special Rapporteur remained convinced of the importance of addressing irregular border crossings, which is where the most egregious human rights abuses appeared to take place. The increased numbers of migrant crossings and deaths in the Mediterranean Sea, as well as weaknesses in the response by European Union member States, prompted the Special Rapporteur to revisit the issues. In addition, the President of the Human Rights Council requested him, at the Council's twenty-seventh session, to monitor the situation of migrants at sea.

8. The present report should be read alongside the reports on the visits to Italy and Malta and the report to the Human Rights Council on European Union border management (A/HRC/23/46).

III. Follow-up to the 2013 regional study on management of the external borders of the European Union and its impact on the human rights of migrants

A. Introduction

9. Despite some positive developments, the human rights issues raised in the Special Rapporteur's 2013 report persist. The continued ineffectiveness and paradoxes of European Union border management policies and the lack of a coherent, human rights-based approach to migration have been vividly and visibly demonstrated by the deaths of migrants in the Mediterranean Sea. These tragic events have propelled the issue of the human rights of migrants who use sea-based migratory routes into the spotlight. Suffering that is less frequently discussed is also being seen at all stages of migration, including within the European Union.

10. Given the European Union's share of global resources and wealth of substantive normative standards, recent deaths at sea and other human rights issues have to be seen as the result of collective political will and policy choices. The suffering of so many and the tendency of migration to take place clandestinely is a symptom of systemic failings within the European Union border management system and a clear sign that the region is losing control of migration despite sustained investment in securing borders. These failings also cut deeper and speak to how the European Union responds to difference and diversity.

11. The costs associated with attempting to sustain the status quo are huge. The human costs continue to rise as migrants die at sea and suffer on a large scale at borders, within the European Union, as well as in neighbouring countries. Furthermore, the resources lost through investing into an ineffective system and not maximizing the opportunities to benefit from organized migration are significant.

12. To remedy this, the European Union needs to take a whole-system view of migration and review how its related policies and underlying concepts can be shifted to develop a human rights-based approach. Taking a long-term view and banking on mobility over the next 25 years will better place the Union to respond to the significant economic, social and demographic changes that lie ahead.

B. Overview of migration since 2013

1. Sustained increases in non-European Union migrants have not been seen but irregular migration and asylum applications are increasing

13. A sustained increase in overall migration from third countries has not been seen over the past five years. The Organization for Economic Cooperation and Development (OECD) estimates that, in 2012, the European Union experienced a 12per cent decline in migration involving non-European Union nationals.[1] The overall decrease in flows to the European Union is reflective of the fact that the region has broadly deemed migration from third-

[1] OECD, "Is migration really increasing?", Migration Policy Debates (May 2014).

country nationals to be undesirable and dramatically reduced regular migration opportunities.

14. The direct secondary effects of this approach can be seen in irregular migration trends. While regular migration to the European Union is decreasing, a clear trend since the 2013 report is an increase in irregular migration and asylum claims. The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) reported that, in the fourth quarter of 2014, irregular migration was at the highest level (100,000 irregular crossings) since 2007, when data started to be shared within the context of the FRONTEX Risk Analysis Network (FRAN).

15. Asylum claims have also significantly increased. Having peaked in 1992 (670,000) and again in 2001 (424,200), the number of asylum applications within the European Union fell to just below 200,000 in 2006. From that relative low point, there was a gradual increase in the number of applications until 2012, after which the rate of change quickened considerably as the number of asylum seekers rose to almost 450,000 in 2013.

16. Within the global context, the proportion of those displaced by humanitarian emergencies seeking refuge in Europe is still small. As reported by UNHCR, the world is currently experiencing the highest levels of displacement since the end of World War II and, at the beginning of 2015, 1.3 million refugees were registered in Lebanon and 1.9 million in Turkey. In comparison, the European Union assessed around 620,000 asylum applications in 2014.

2. Migration trends are diverging

17. Trends in regular migration to the European Union are not affecting all European Union member States evenly. Countries such as Germany, Finland and France have seen increasing flows in 2012, while Italy, Spain and the United Kingdom of Great Britain and Northern Ireland have experienced a decrease in permanent inward migration.[2]

18. Trends in asylum claims too show divergence, with Eurostat figures for 2014 ranging from 126,705 in Germany to 55 in Liechtenstein. Also according to Eurostat, the proportion of applications being processed by Germany, Sweden and Italy went from 37per cent in 2010 to 60 per cent in 2014.

3. Sea-based migration and deaths at sea

19. While a number of precarious, sea-based routes to the European Union exist, by far the most commonly used since 2013 has been the central Mediterranean route. The dramatic increase in the use of that route has tragically resulted in large-scale loss of life. UNHCR estimates that 3,000 people died or went missing at sea in 2014. Events in the first four months of 2015 suggest that the use of this route and the associated avoidable deaths of migrants continue at an alarming pace.

20. While the majority of sea-based migration passes through the central Mediterranean Sea, the European Union is aware that, as a result of efforts to secure the border with Turkey, more refugees and migrants have begun taking the route across the Aegean Sea to the Greek islands. FRONTEX reported that during the period from July to September record numbers of migrants used those channels. In October 2014, the United Nations High Commissioner for Refugees warned that the situation was reaching crisis point.

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[2] Ibid

4. Increased xenophobia towards migrants

21. Against a backdrop of a poor economic climate, the rise in nationalist populist parties within the European Union and the tragic terrorist attacks in Paris at the beginning of 2015, xenophobia and hate speech have increased. This rise in xenophobia against migrants since the Special Rapporteur's 2013 report is a significant trend relating to how migrants are perceived in Europe, as well as a stumbling block in the development of more progressive policies.

5. Positive developments

22. A number of positive developments have taken place in relation to the human rights of migrants within the European Union. These include:

(a) Judgements of the European Court of Human Rights and the European Court of Justice, which have challenged externalization practices, "the Dublin logic", immigration detention and access to social protection issues;

(b) The work of FRONTEX Fundamental Rights Officer Inmaculada Arnaez Fernandez and her staff, which includes the establishment of a code of conduct for joint return operations, the Vega Children Handbook and the establishment of a mechanism for monitoring fundamental rights;

(c) The search and rescue operations provided by both the Government of Italy and FRONTEX through the Mare Nostrum and Triton operations. The Special Rapporteur notes, however, that Triton's operations have been limited, as discussed below;

(d) Regular migration initiatives, including the Blue Card system, the seasonal workers directive and the draft student and researchers directive;

(e) Efforts by the European Parliament and the European Commission to respond to the current crisis in the Mediterranean Sea;

(f) The attention of the European Union Agency for Fundamental Rights on the human rights of migrants, including at the Agency's 2014 annual conference.

23. Despite these positive elements, a continued focus on security continues to structure the way in which the European Union handles border management. A wholesale, coherent integration of the human rights of migrants in policies is missing. The system continues to be characterized by complexity, a lack of harmonization between relevant policies and regional and international human rights standards, limited responsibility sharing and the absence of the political will needed to initiate the required changes.

C. Analysis of the European Union's management of migration and control of its external borders in relation to the human rights of migrants

1. Status quo is not sustainable

24. The current European Union border management system is buckling under the pressure of increased irregular migration, despite the relatively small proportion of those displaced by crisis seeking refuge in the Union.

25. As migrants continue to die at sea, and large-scale suffering is experienced at each stage of migration, it is clear that the European Union does not control migration. This lack of control manifests itself in a number of different ways, raising a wide range of human rights concerns, many of which have persisted since 2013 and have gained increasing impetus and urgency over the past two years.

Precarious routes into the European Union and human rights

26. The use of precarious routes into the European Union, particularly through the central Mediterranean Sea, has increased dramatically since 2013 and resulted in large-scale violations of the right to life, as well as significant human rights abuses at all stages of the migratory process. This form of migration is driven largely by conflict and poverty (push factors), as well as by unmet needs within European labour markets (pull factor). Many of these migrants are being forced to use precarious routes because of their desperate situation and a lack of regular migration opportunities.

27. Organized smuggling rings are profiting from this lack of regular migration channels, staying ahead of border control initiatives and facilitating crossings through precarious routes in exchange for large payments. Smugglers have displayed a remarkable disregard for the dignity, life and rights of migrants and have systematically exploited those desperate to reach safer soil.

28. Commonly, boats carrying migrants to the European Union leave from: Egypt and Libya when using central and eastern Mediterranean channels; Morocco and Tunisia when using the western Mediterranean; and Turkey when using the Aegean Sea route. Many migrants have come an extremely long way, including from sub-Saharan countries and countries in the Middle East, to make these journeys. Migrants travelling through the Sahara are subjected to horrific treatment, including rape and other forms of violence.

29. When migrants reach their intended country of departure, they often suffer further violations of their rights. The European Union Agency for Fundamental Rights has published reports of makeshift camps with extremely poor conditions that are run by migrants in Morocco, as well as of migrants locked in small huts by smugglers in Turkey. Smugglers typically charge several thousand United States dollars per person for boat journeys to the European Union. Families with multiple members can pay in excess of US$ 10,000 to make the trip.

30. The boat trips themselves are perilous, involving very basic vessels that have limited navigation systems, are not seaworthy and often have insufficient amounts of food, water, fuel, first aid kits and life jackets. Boats are usually extremely overcrowded and sometimes contain more than double the recommended capacity. Once migrants have paid for the journeys, they are often forced to go ahead with their plans despite sometimes having second thoughts when seeing the vessels. Migrants have reported incidents of boats not having captains, with inexperienced migrants being required to navigate, as smugglers do not want to risk being caught by the authorities.

31. When smugglers are on the boats, incidents of sexual violence and slavery against women have been reported. The crossing from North Africa takes, on average, between one and three days, but can increase significantly depending on the boat and the maritime conditions. Many boats capsize or go into distress.

32. The search and rescue services provided unilaterally by Italy and FRONTEX are a response to these alarming trends (see appendix). In a report to the Special Rapporteur, the European Commission said that Operation Mare Nostrum had rescued over 160,000 persons at sea in 2014 and that Operation Triton was estimated to have rescued approximately 22,300 people between November 2014 and early 2015. In addition, some private and military vessels have saved migrants' lives. However, as underlined by the International Maritime Organization, the support provided to search and rescue operations by merchant vessels should remain exceptional, and States should shoulder the main responsibility for such operations.

33. While positive efforts to protect migrants' right to life have been made, they remain insufficient. Key challenges include Operation Triton's limited mandate for effective search

and rescue operations compared with the mandate of Operation Mare Nostrum, incoherence in search and rescue zone management, tensions between unilateral and regional interventions, disincentives for private and military vessels to provide assistance to migrants, limited resource commitments from member States and difficulties in establishing disembarkation protocols.

34. While search and rescue services are a vital part of addressing the human rights challenges faced by migrants trying to reach the European Union by precarious routes, the root causes of the use of these channels must be examined. A key driver is the lack of regular migration channels that reflect the European Union's genuine labour needs and the humanitarian and protection needs of those fleeing humanitarian situations. The European Union's collective response to the Syrian crisis exposes a remarkably intransigent refusal to offer Syrians any significant migration opportunities. Most European Union member States have preferred to look the other way, unsurprisingly pushing migrants to turn to smugglers.

35. The increased use of the central Mediterranean route demonstrates beyond any reasonable doubt that, whatever measures the European Union implements, migrants will continue to come to the region and that "sealing" European borders is impossible. The risks that migrants are prepared to take to reach safer soil show that border control measures are not an effective disincentive when desperate people face situations of war, insecurity, violence and extreme poverty.

Externalization

36. Concerning trends in the use of externalization techniques have continued since the publication of the 2013 report. The European Union has adopted the Global Approach to Migration and Mobility as a policy framework with significant scope for future migration governance and border control. The Approach comprises a complex and vast array of loosely associated policy and legal mechanisms, as well as a number of projects in countries of transit and origin.

37. Mobility partnerships are a key tool of the Approach and have been prominent in the recent dialogue held by the European Union on its migration and border management. The partnerships address a broad range of issues ranging from development aid to visa facilitation, circular migration programmes and the fight against unauthorized migration, including cooperation on readmission. The European Union has signed mobility partnerships with Azerbaijan, Jordan, Morocco and Tunisia since 2013. It has also signed a common agenda on migration and mobility with Nigeria.

38. Overall, the Global Approach to Migration and Mobility lacks transparency and clarity on the substantive contents of its multiple and complex elements. Additionally, many agreements reached in the framework of the Approach have weak standing within international law and generally lack monitoring and accountability measures, which allow for power imbalances between countries and for the politics of the day to determine implementation. Nonetheless, the European Union has continued to use the Approach to promote greater "security". There are few signs that mobility partnerships have resulted in additional human rights or development benefits, as projects have unclear specifications and outcomes. The overall focus on security and the lack of policy coherence within the Approach as a whole creates a risk that any benefits arising from human rights and development projects will be overshadowed by the secondary effects of more security-focused policies.

39. Readmission agreements are an area of particular concern. Despite protections against such practices in European Union legislation, pushbacks and refoulement to countries of origin and third countries with weak rule of law and poor asylum systems have been conducted under the broad auspices of bilateral agreements. The European Court of

Human Rights has challenged such practices. In 2012, the court ruled on *Hirsi Jamaa and Others v. Italy*, and held that Italy had violated articles 3, 4 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms by returning Somali and Eritrean migrants travelling by sea back to Libya. The argumentation of the Government of Italy cited the bilateral readmission agreement in place between Italy and Libya. However, the ruling, which was in favour of the applicants and awarded compensation, reflects that bilateral agreements cannot be used to justify practices that are incompatible with human rights. In 2014, in *Sharifi and Others v. Italy and Greece*, the European Court of Human Rights ruled on the treatment of irregular migrants who had entered Italy from Greece and then had been deported back to Greece, with the fear of subsequent deportation to their respective countries of origin. The Court ruled that both countries had violated articles 3 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms and that Italy had violated article 4 of Protocol No. 4 to the Convention.

40. In 2014, the European Commission launched a pilot project introducing a mechanism in Pakistan and Ukraine to monitor whether the human rights of returnees are respected. The project is implemented by the International Organization for Migration with UNHCR and local partners. The Special Rapporteur urges the European Union to ensure its effective implementation and to analyse and publish the results of this implementation. Furthermore, starting now, no one should be returned to any country under the Global Approach to Migration and Mobility without oversight by an effective post-return human rights monitoring mechanism.

Continuing use of detention as a tool of border control

41. After making often extremely long, dangerous and arduous journeys to the European Union, many irregular migrants and asylum seekers are subjected to immigration detention. Detention is also commonly used by many States when migrants are waiting to be returned, either because of an unsuccessful protection claim or because they have been identified through the Eurodac database as having entered the European Union in another country.

42. Some instances of immigration detention in European Union member States are in contravention of international human rights law because such detention is defined in domestic law as not reasonable, necessary or proportionate, and because it is not decided on a case-by-case basis. Additionally, there are a number of human rights concerns relating to the impact of detention. Many migrants perceive their treatment as harsh and punitive, despite irregular migration not being in any way a criminal act. Prolonged detention without a clear basis has been shown to have a devastating effect on migrants' and asylum seekers' mental health, for example by contributing to post-traumatic stress disorder, anxiety and depression. This is frequently compounded by unacceptable detention conditions, such as unsanitary toilet and shower facilities and unhygienic kitchens. Plus, there is a lack of access to health care, as well as to physical and recreational activities.

43. Long periods of immigration detention can also lead to sustained barriers to migrants claiming their economic and social rights, even after having been released. UNHCR research suggests that detention disempowers migrants who are often keen to work. A sustained absence from the labour market and the emotional and mental toll of detention can lead to migrants becoming unnecessarily dependent on State-provided support.

44. Of particular concern is the inclusion of children among detainees. Children are usually afforded additional protections by member States and, according to many national policies, are not supposed to be detained. However, if the age of the child is unknown, which is common among those without documents or coming from countries that do not have robust birth registration systems, they can be detained or kept in reception centres until their age can be verified. This can take weeks or months. In some instances, while in

detention, children live and sleep with adults, without any special accommodation made for their young age and without access to education. In others, families are separated in different sections of the detention facility according to age and gender. The detention of children, even for short periods, can have severe negative psychological effects. It has been made clear by the Committee on the Rights of the Child that immigration detention is never ever in the best interest of the child and that families of migrants should not be separated. Hence, unaccompanied minors and families with children should always benefit from alternatives to detention.

45. Alternatives to detention are being explored. For example, legal reforms in Italy have reduced immigration detention from 18 to 3 months and, in Greece, the Government has announced a policy change to reduce detention times and release significant numbers of detainees. A number of countries have moved towards more open reception facilities, particularly for vulnerable migrants such as children and families. Despite these welcome changes, prolonged immigration detention, and the associated negative consequences on the human rights of migrants, continues in many member States.

Access to justice

46. The Special Rapporteur notes a promising trend in relation to access to justice, as national and regional bodies appear willing to support migrants in fighting for their rights.

47. However, systematic barriers to the right to access justice are in place in many European Union member States. Significant resource constraints are making member States unwilling to invest in services that facilitate access to justice for migrants, such as legal aid and translation and interpretation services. Migrants' fear of detection and/or deportation if they assert their right to access justice is also a key barrier. Additionally, inconsistencies in access to justice persist, depending upon the rights at stake, the type and nationality of the migrants and the jurisdiction. Finally, a lack of specific rules on courts' duties to apply sanctions and/or compensation for violations of migrants' human rights is another important barrier.

48. Concerns about access to justice have been expressed in a number of rulings of the European courts. Decisions of the European Court of Human Rights in *Louled Massoud v. Malta* (2010) and *Suso Musa v. Malta* (2013) held that the way in which both applicants were treated violated articles 5 (1) and (4) on the basis that not all the detention had been legal and proceedings to determine its legality had not been adequately implemented. In June 2014, The European Court of Justice made a significant ruling in the case of Bashir Mohamed Ali Mahdi, emphasizing that, under European Union law, a lack of identity papers should not be used to justify extending immigration detention and that migrants should have access to justice to challenge such detention.

Fingerprinting and freedom of movement under the Dublin system

49. Severe restrictions on the movement of asylum seekers under the Dublin system, which are in sharp contrast to the mobility provided to European Union citizens through the freedom of movement framework. Under the Dublin regime, asylum seekers are required to have their claim assessed in the country deemed responsible for their entry into European Union common territory, which is most often the first country of entry. Once fingerprints have been collected, they are entered into the Eurodac database, which is shared among member States. If migrants whose details are stored in this database apply for protection in other member States, they will usually be returned to the country through which they entered the European Union.

50. The Dublin regulations have not been accompanied with significant standardization of asylum procedures and criteria, therefore creating incentives for migrants seeking to

remain in the European Union to travel to countries other than their first country of entry. In addition, under the Dublin system, migrants are often retained in front-line countries where there are very limited economic opportunities. For example, Italy has faced a huge influx of asylum seekers as well as a sustained economic downturn. This has resulted in migrants becoming stuck where there are no jobs available for them, with disastrous results for migrants and the host society.

51. The system also creates the potential for tension at borders, as many migrants do not want their fingerprints to be taken. Troubling reports have emerged recently about border management officials using force to collect fingerprints. The system also increases the market for smugglers and encourages the use of precarious routes across Europe, as migrants seeking protection are forced to do so in an irregular way, to avoid detection and forced fingerprinting. It is disconcerting to see that European Union rules and practices have caused the reappearance of smuggling routes within the Union, when such routes had practically disappeared with the establishment of freedom of movement.

52. The European Commission took note of the issue of forced fingerprinting in 2014. It requested information from European Union member States on the legal frameworks in place and common practices. Some States, such as Greece, Malta and Italy, have legally allowed the use of force if migrants resist fingerprinting, while other States, such as Austria and Ireland, have prohibited such a practice. Responses from all Governments tend to suggest that migrants and asylum seekers are rarely unwilling to give their fingerprints, while others have said that it is very difficult to force a person who fundamentally will not cooperate. Even countries, such as Malta, that reported migrants being uncooperative at the point of disembarkation claimed the individuals could typically be recalled later for fingerprinting. While these reports by member States are encouraging, troubling anecdotal evidence by migrants and front-line workers suggests that force has been used in countries of first entry to the European Union.

53. The European Court of Human Rights has recently ruled on two significant cases in relation to the Dublin logic. As discussed above, in 2014, the European Court of Human Rights ruled, in *Sharifi and Others v. Italy and Greece*, that both countries had violated articles 3 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In *Tarakhel v. Switzerland*, in November 2014, the Court ruled on the refusal of Switzerland to examine the asylum application of members of an Afghan family and the decision to send them back to Italy without assurances that their rights would be protected. The Court held that there had been a violation of article 3 of the Convention and discussed "systemic deficiencies" in the Italian system. In 2011, in *M.S.S v. Belgium and Greece*, the Court held that Belgium had violated article 3 of the Convention by deporting an Afghan migrant to Greece despite systemic failures in asylum and social protection provisions.

54. Alongside this jurisprudence, there are other signs that the Dublin logic is failing and that the restrictions to freedom of movement are not sustainable. For example, FRONTEX has reported that European Union border States are making significant reforms to detention policies, possibly enabling greater freedom of movement and a decrease in successful returns.

Migrant workers

55. The precarious routes to Europe discussed above are mixed migration channels, with economic migrants also risking their lives to seek opportunities because regular channels for migrant workers to the European Union do not exist. Some progress in opening up economic migration channels has been made through the development of the Blue Card system and the seasonal workers directive. However, use of the Blue Card among European Union member States is low and sustained opportunities for low-skilled migrants are scant. In sectors where regulation is inadequate, such as domestic work, care, construction,

agriculture and tourism, migrants in need of work but unable to get visas come irregularly and can become vulnerable to abuse, violence, restrictions on their freedom of movement and economic exploitation.

56. While the relationship between irregular migration status and labour market abuses is complex, the former will tend to increase vulnerability to the latter. Undocumented workers, constrained by circumstances, will perform tasks at great financial, physical and psychological cost. Little attention has been given to the impact European Union labour market dynamics has on pull factors for irregular migration and the suffering of undocumented migrant workers in the European Union. While the human rights implications of using precarious sea routes have been highly visible, the suffering experienced by undocumented migrant workers inside the European Union is largely invisible.

57. Migrant workers trying to survive in Europe often find themselves subject to racism and xenophobia. Labour market-related abuses and xenophobia within the overall population are mutually reinforcing. It has been reported that employers do not employ even highly skilled foreign workers and that there is a failure to maximize the potential of migrant workers within the European Union, with many migrants underperforming in the labour market relative to their education, in part because of xenophobic attitudes.

58. The unwillingness of European Union member States to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families reflects the intention to not be held accountable for human rights abuses against undocumented migrant workers.

2. Developing a human rights-based framework that banks on mobility over a generation

59. All the human rights concerns discussed above are signs of stress within the European Union border management and migration systems. They are clear indications that the status quo simply is not sustainable. Ignoring these warning signs and pouring further resources into an ineffective and paradoxical closure system will lead to further avoidable human suffering, as well as wasted resources and lost opportunity costs from not reaping the rewards of organized mobility.

60. Developing a human rights-based framework by tackling the most pressing concerns and sustaining the political will needed to stay the course of reform over a generation will allow the European Union to bank on the economic and social benefits of mobility.

Developing a human rights-based framework

61. States assume obligations and duties under international law to respect, protect and fulfil human rights. These obligations and duties on States under international law are also broadly echoed by the standards within the European human rights system, which apply to all regardless of nationality and administrative status.

62. A human rights-based framework for migration would ensure the application of these obligations and duties to people in vulnerable situations of migration. It is a framework based on equality and non-discrimination, the duty to protect and access to justice. By upholding the principles of equality and non-discrimination, States acknowledge that human rights are for all and that migrants should be treated as equal rights holders, regardless of their migratory status in relation to the sovereign territory they find themselves in. When migrants are viewed as equal rights holders, a duty to protect them at all stages of the migration process naturally follows. If violations of these rights occur at any point, as equal rights holders, migrants must have access to justice to remedy any injustice.

63. The establishment of a human rights-based framework based on the core principles and provisions of international and regional law requires immediate action to stop widespread suffering at the borders of the European Union.

64. A vital first step is for the European Union to scale up search and rescue operations at sea to at least the level of Operation Mare Nostrum. While some efforts have been made, it is vital that the European Union expand the resources committed to providing assistance to those in distress at sea. The Special Rapporteur urges the European Union to strengthen its search and rescue capacity, while also doing the following: respecting the principle of non-refoulement; allowing irregular migrants to disembark immediately at the nearest port; providing information, care and support to migrants; processing asylum claims equitably; and supporting commercial vessels in exceptional circumstances to carry out rescue operations without risk of retaliation or harassment for being considered accessories to smuggling operations. The priorities should be clear: fighting smuggling operations is less important than saving lives. The argument according to which one should not increase search and rescue capacity in order to avoid encouraging smuggling operations is morally, politically and legally unacceptable when human lives are at stake.

65. The development of a human rights-based framework goes beyond protection at sea. Stepping up the creation of alternatives to detention, particularly for children, is another issue of concern that should also be a priority.

66. In the long term, the European Union needs to take stock of the durable failure of the Dublin logic and develop options for solidarity among its member States and greater freedom of movement for migrants in Europe. Reversing the present logic, asylum seekers should be able to register their asylum claim in the country of their choice and the European Union should build upon current initiatives and support the countries receiving asylum claims with proportionate and adequate financial and technical support. Standardizing reception conditions and refugee status determination procedures throughout the European Union should be a top priority, in order to avoid "asylum dumping" and stress on the countries that offer better conditions.

67. Developing a human rights-based framework will require continued commitment and the development of many more regular migration channels, including resettlement opportunities for refugees. The most effective way to do this is to begin a process of opening up regular migration channels to the European Union, exploring a range of options.

68. Firstly, many people presently crossing the Mediterranean Sea are, thanks to smugglers, manifestly in need of international protection, such as most Syrians and Eritreans. One cannot expect Syrians to live in camps or cities in Jordan, Lebanon or Turkey indefinitely, with no prospects for a better life. If no other option is available, refugees will take their chances with smugglers in order to provide a future for themselves and their children, as many Europeans have done in similar circumstances in the past. Through resettlement programmes for refugees and other humanitarian visas and opportunities, it is well within the European Union's means to develop the mechanisms necessary for providing refuge, over a number of years, for 1 million of refugees displaced by the Syrian and other major conflicts. Together with partner States in the global North and elsewhere, creating a reliable long-term programme will ensure that a large number of refugees will line up for resettlement rather than spend tens of thousands of euros and risk their lives and that of their children in smuggling operations. This would considerably reduce the market for smugglers and the cost of refugee status determination procedures in Europe.

69. Secondly, smugglers and exploitative employers are presently implementing the labour mobility that many European labour markets need in order to thrive. Through creative visa opportunities for work at all skills levels, including for low-wage migrants, the

European Union could streamline the number of migrants coming through irregular means. Coupled with entry and exit controls and other supporting initiatives, multi-year and multi-entry visas could incentivize migrants to come to the European Union for work and return to the country of origin while respecting visa conditions. For such a plan to be successful, the European Union and its member States will need to considerably reduce underground labour markets and exploitation in the workplace over the coming decade, as they act as a magnet for irregular migration at the request of exploitative employers: tougher labour inspection mechanisms and stronger labour unions will be needed to achieve such results.

70. Fully sustaining the implementation of a human rights-based framework for regular migration across the European Union therefore involves: increasing search and rescue capacity; facilitating access to justice for migrants; developing alternatives to detention; reinforcing labour inspection mechanisms needed to ensure the rights of all workers in the European Union, including migrant workers; creating massive resettlement programmes for refugees; and creating multiple labour migration visa opportunities to incentivize migrants to use regular migration channels.

71. The successful implementation of this policy mix requires challenging the many intersecting and negative perceptions of migrants and migration that have pervaded European Union debates, discourses, policies and politics. The strict conceptual delineation between internal and external migrants, demonstrated by the freedom of movement within the Schengen region and the securing of external borders, conflicts with a human rights-based framework for migration that is based on equality and non-discrimination. This distinction also rests on the assumption that sealing international borders is possible, which the unsustainable status quo strongly shows is not the case.

72. The view of migrants among many stakeholders as "illegal" is counterproductive and is not based on facts or the provisions of international law. While migrants who come to the European Union without documents are in an irregular situation (or "undocumented" or "unauthorized"), they have not committed a criminal act. The conceptualization of irregular migrants as "illegal" has undoubtedly played into the use of immigration detention. It has also had an impact on the general public's perception of migrants, legitimizing policies that are not in line with human rights guarantees and contributing to xenophobia and discrimination.

73. The common conception that migrants are "job stealers" is also a harmful fantasy. Much economic literature (see Card and Peri[3]) has highlighted how migrants complement rather than compete with citizens, therefore creating greater overall productivity within the economy. A 14-year study (Peri and D'Amuri[4]) into the effects of non-European Union migration on 15 Western European countries showed that by taking manual jobs, migrants pushed natives towards more highly skilled and better-paid jobs. In that study, a significant increase in more complex skills among natives following migration was noted. The labour market adjusted with no significant impact on natives' employment rates. The impact of the global recession was shown to decrease but not eradicate this positive phenomenon, debunking the argument that an economic downturn justifies repressive policies.

74. Similarly, conceptions of migrants as "a burden" are not based in reality, nor are they productive. Much European Union debate focuses on the need to share the "burden" of

[3] David Card, "The impact of the Mariel Boatlift on the Miami labor market" (1990); Giovanni Peri, "Immigrants' effect on native workers: new analysis on longitudinal data" (2015); Andri Chassamboulli and Giovanni Peri, "The labor market effects of reducing the number of illegal immigrants" (2015).

[4] Francesco D'Amuri and Giovanni Peri, "Immigration, jobs and employment protection: evidence from Europe before and during the Great Recession" (2012).

irregular migration across different member States. Against a backdrop of fiscal and demographic challenges in many countries and political discourses of austerity, discussing external migration as a "burden" again legitimizes the further securing of borders and encourages negative public attitudes. While society undoubtedly has a responsibility towards migrants and more solidarity in sharing this responsibility is encouraged, migration in itself is not and should not be presented as a burden. Much economic literature suggests that, as workers, consumers and taxpayers, migrants contribute to the economic growth of societies with very limited downsides. In fact, the perceived burden of migration comes predominantly from the financial, technological and human resources necessary to implement the European Union's counterproductive security-focused policies and deal with their unintended (although foreseeable) secondary effects. Acknowledging that migrants are human beings with rights, the European Union and its member States should be talking about sharing a responsibility, not a burden.

75. The normative basis for more positive, realistic views of migrants sits within an abundance of fact-based analysis, as well as the European Union's founding values of respect for human dignity, freedom, democracy, equality, the rule of law and human rights for all, as evidenced in the robust human rights regime and the international human rights instruments that member States have ratified.

Banking on mobility over a generation

76. Applying the European Union's core values to policies that are based on fact rather than fiction leads to migration policies that facilitate mobility and celebrate diversity. The long-term development of the human rights-based framework discussed above will become increasingly vital to the Union's internal and external interests. Over the next 25 years, Europe will undergo large-scale demographic, societal and labour market changes.

77. By 2025, more than 20 per cent of European Union citizens will be over 65 years of age, with a particular increase in those over 85. The population of elderly people will almost double, from 87.5 million in 2010 to 152.6 million in 2060. It is also expected that the share of those aged 80 and over will rise from 5 to 12 per cent.[5] At the same time, many member States have fertility rates below the rate of replacement. An average fertility rate of 2.1 children per woman is estimated to be necessary to keep the population at a stable size between generations in developed countries. United Nations population data suggests that between 2010 and 2015 all European Union countries will have had average fertility rates below the 2.1 mark with the regional average being 1.6.

78. In line with these demographic changes, the European work force is declining. In 2010, for the first time, more workers were retiring from the European labour market than were joining it. The European Union and OECD are predicting that, with a zero net increase in migration, the working age population will drop by 3.5 per cent by 2020. Over the next 50 years, the working-age population is expected to decline by nearly 42 million.[6]

79. These changes have the potential to exacerbate and widen existing skills gaps within the European Union. Of the companies that responded to the 2013 European Company Survey, 40 per cent stated that, despite high unemployment levels, they found it difficult to find applicants with the correct skills set. The demographic shifts discussed above are going to add pressure and impetus to the need to ensure balance between labour supply and demand. According to both the European Union and OECD, for the European Union to

[5] European Commission, *Population Ageing in Europe: Facts, Implications and Policies* (2014).

[6] Ibid. See also OECD and European Union, "Migration Policy Briefing" (2014).

meet its 2020 employment targets, it will need to employ a mix of policies and reconsider how it utilizes the skills of non-European Union migrants.

80. In the context of such shifts, the European Centre for the Development of Vocational Training has projected that there will mainly be an increase in demand for workers with medium and high skill levels and that demand for workers with low skills will decrease. However, demand for low-skilled workers in 2025 is still projected to be significant, at around 43 million. This figure has to be viewed against the European Union 2020 target of increasing the proportion of citizens gaining a tertiary education, as well as the already rapid increases in those doing so. According to the Centre, between 2002 and 2013, a 13 per cent increase in the proportion of 30-34 year olds who have attended tertiary education and a 57 per cent increase in the absolute number of tertiary education graduates were recorded.

81. Another reason for adopting a human rights-based approach is the European Union's need to remain globally competitive. The World Economic Forum has noted diverging trends between European countries, with some, such as Germany, the Netherlands, Sweden and the United Kingdom, being among the top-10 most competitive economies in the world, and others lagging behind. The highest-ranking European Union country was Germany, in fifth place, and the lowest-ranking was Greece, in eighty-first place.[7] There is currently a low level of highly skilled labour migration from non-European Union countries to most member States owing to barriers to legal access and an informal reluctance by employers to hire from outside the region. This demonstrates how an approach defined by an emphasis on security can permeate all dimensions of migration.

82. Well-organized migration would allow member States to properly understand the skill level of non-European Union migrants and support realistic strategies for filling labour gaps and shortages in order to maintain and build global competitiveness. Migrants in irregular situations cannot be assumed to have low skill levels. Those that do can still contribute in important ways, given the aim of building the capacity of Europeans and the continued projected demand for low-skilled workers.

83. A well-organized migration policy based on mobility and human rights could also help the European Union to enhance its humanitarian and development impact. In 2013, migrants sent approximately $404 billion in remittances, as highlighted in the 2013 report of the Special Rapporteur. Migrants who moved from countries with a low human development index to countries with a higher index experienced, on average, a 15-fold increase in income, a doubling in education enrolment rates and a 16-fold reduction in child mortality. If the human rights of migrants are effectively promoted, respected and protected within well-governed migration processes, such development outcomes can be greatly enhanced.

84. Committing to a generational shift in migration policy that recognizes that external mobility can mirror the benefits of internal mobility, will better equip the European Union and its member States to deal with these economic, social and demographic changes in a way that sustains recovery, encourages growth and further develops global competitiveness. It will also allow the European Union to truly promote its founding values in its relations with the rest of the world, as envisaged in its Constitutional Treaty.

[7] World Economic Forum, *The Global Competitiveness Report 2014-2015* (Geneva, 2104)

IV. Conclusions and recommendations

A. Conclusions

85. The events in the Mediterranean Sea and the mirroring of this suffering across each stage of the migratory process within the past two years have clearly shown that the status quo in relation to the European Union's approach to border control, asylum and migration is not sustainable. The ability of migrants to reach European soil despite a huge investment in securing borders demonstrates beyond a doubt that sealing international borders is impossible. Migration is a long-standing part of the human condition and, in the globalized and conflict-ridden world in which we live, it is inevitable.

86. The costs of denying this reality are huge. Most significantly, the human costs continue to grow. There are no signs that the push and pull factors influencing migratory patterns will change and the many grave associated human rights abuses will decrease. In addition to the human costs, the huge investment of resources by the European Union and its member States into ineffective and paradoxical border control mechanisms could be spent in many other ways.

87. As huge as these costs are, they are in no way inevitable. It is not beyond the moral agency of the European Union to considerably reduce the suffering of large numbers of migrants. The Union's regional system of human rights and other normative standards, its founding values and its strong tradition of promoting peace, security and human rights, clearly show that the Union has the potential to play a global leadership role on the issue of migration.

88. Claiming this leadership role involves the development of coherent and holistic human rights-based approaches that require short-, medium- and long-term interventions. It is vital that, in the short term, the European Union step up search and rescue operations, further explore alternatives to detention, particularly for children, start providing more resettlement opportunities for people from the Syrian Arab Republic and other countries, in line with its share of global resources, and take stock of the failing Dublin logic and the systemic pressures it is creating.

89. While this would already have a significant impact on the human rights of migrants, it is important that the European Union also take a strategic, long-term view. In the medium term, the Union should continue to provide resettlement opportunities and open regular migration channels at all skills levels, invest in labour inspection and tackle xenophobia, racism and discrimination against migrants. These changes need to be sustained over the long term and accompanied by a fundamental rethinking of the conceptualization of migrants and the development of integration programmes within the context of general diversity policies.

90. To achieve sustainable success, the European Union must consider how its founding principles and normative standards apply to those who are not citizens of its member States. It must use fact-based analysis and rational, long-term thinking to challenge the many negative conceptualizations that underpin current social and policy debates relating to migration within the Union. These include the strict delineation between internal and external migrants, the idea of irregular migrants as being "illegal", the preoccupation with irregular, non-European Union migration as being a "burden" within the context of continuing fiscal challenges and the perception of migrants as being "job stealers" who deprive native citizens of economic opportunities.

91. **The benefits of this rethinking and of the European Union taking a leadership role go far beyond the fulfilment of normative commitments. Fact-based economic analyses have tended to conclude that migrants contribute to economic growth and productivity. As Europe changes over the next generation, extending mobility to those outside its borders will allow European Union member States to reap opportunities for peace, security and sustainable development both within and outside the Union.**

B. Recommendations

1. General recommendations

To the European Union and its member States

Overall

92. **Accept the impossibility of "sealing" borders and the perverse incentives and paradoxes created by the current system, as well as the inevitability and benefits of mobility. Conversely, highlight the necessity of incentivizing all migrants to default to services provided by the European Union and its member States and use entry and exit control mechanisms rather than resorting to smuggling rings.**

93. **Invest in the overall development of a coherent and robust migration policy that fully reflects the human rights of migrants as enshrined in both international and regional law.**

94. **Convey a road map for the evolution of this policy by developing a full 25-year strategy that outlines clear short-, medium- and long-term interventions and that articulates a shared vision for how the European Union can bank on mobility over a generation.**

95. **Invest in filling data gaps — such as those around underground labour markets, labour exploitation of migrants, deaths at sea and push and pull factors — to develop evidence-based policies. In addition, increase harmonization and coordination in respect of migration data sources to develop a systemic picture.**

96. **Through fact-based analyses and long-term thinking, reflect on the conceptualizations of migrants and migration that underpin counterproductive and ineffective security policies and result in the criminalization and stigmatization of migrants.**

97. **Integrate these analyses at a political level, as well as within public communication and education curricula.**

98. **Fully recognize the push and pull factors of irregular migration, including that undertaken by sea, and the European Union's responsibility in managing and mitigating them.**

99. **Use the region's considerable global influence, including two permanent and one non-permanent seat on the Security Council, to push for more effective solutions to humanitarian crises in the Syrian Arab Republic, Ukraine and other countries.**

Regular migration channels

100. **Take a global leadership role in relation to the Syrian civil war and other humanitarian crises and reduce the market for smugglers by developing, in cooperation with other States in the global North, resettlement opportunities so that**

the European Union can accommodate over 1 million of the world's refugees (0.2 per cent of the total population of the European Union) over a number of years.

101. **Develop and incentivize other regular and safe migration channels, including for workers with varying skills levels, including for low-wage workers. Look at a variety of options for legal migration, such as humanitarian admission, humanitarian visas, temporary protection, family reunification, economic admissions at all skills levels, as well as for job seeking, student mobility and medical evacuation, in line with the suggestions of the European Union Agency for Fundamental Rights.**

102. **European Union member States should increase the number of migrants admitted under existing regular migration schemes, including the Blue Card system, the seasonal workers directive and the future student and researcher directive.**

Search and rescue

103. **Prepare for more arrivals by sea and commit to fully implementing obligations under international law to provide search and rescue services to migrants in distress at sea, with State provision being the cornerstone of search and rescue operations.**

104. **Carefully consider options for how incentives that negatively impact private vessels' willingness to assist migrants in distress can be removed, including the development of a means by which compensation is given for commercial losses.**

105. **Develop protocols for how military vessels deployed in the Mediterranean Sea for purposes other than search and rescue should respond to incidents of migrants in distress to complement State action.**

106. **Further develop solidarity and responsibility-sharing mechanisms between border and non-border States in relation to search and rescue operations and processing protection claims through the provision of technical, financial and human resources.**

External management of migration

107. **Improve the coherence of the Global Approach to Migration and Mobility, integrate rigorous human rights, due diligence, monitoring and oversight mechanisms into all external agreements and prioritize projects in countries of origin and transit that will improve the human rights of migrants. For example, as suggested by the European Union Agency for Fundamental Rights, prioritize support that improves search and rescue operations within efforts to build the border management capacity of non-European Union States, as well as support for national human rights institutions.**

108. **Make promoting genuine mobility for non-European Union migrants the cornerstone of the Global Approach to Migration and Mobility.**

Dublin and detention

109. **Take stock of the systemic failure of the Dublin mechanism. Reverse the present logic by allowing asylum seekers to register their asylum claims in the country of their choice within the European Union, while supporting the countries receiving asylum claims with proportionate and adequate financial and technical support.**

110. **Invest in the considerable expansion and harmonization of the European Asylum Support Office through several mechanisms, including through mutual recognition of refugee status determination decisions, exchange of refugee judges**

between States, a common European Union refugee determination appeal board and common or shared reception mechanisms.

111. Develop coordinated efforts to move away from the detention of all migrants, investing in alternatives that avoid punishing those arriving irregularly. Look towards a model that quickly responds to and capitalizes on the strong desire of the vast majority of migrants to work and contribute to society.

112. In line with the best interests of the child principle, step up protections afforded to migrant children, particularly unaccompanied minors, and families with children. Aim to eradicate the detention of children completely and to respond adequately to the vulnerability of children in reception and social protection provisions. Age verification is not a justification for detention and member States should move towards a model that assumes vulnerability and responds by providing adequate protection, given the particularly damaging impact of even short periods of detention on children.

Access to justice and social protection

113. Remove barriers to access to justice ensuring migrants can effectively — and not simply on paper — access legal remedy for violations of their rights. Facilitating access to justice, without fear of detection, detention or deportation, in order to help migrants fight for their rights, would go a long way towards, on the one hand, legitimizing new migration policies by showing that territorial sovereignty and human rights are not incompatible, and, on the other hand, changing mentalities regarding migration through fighting fantasies and stereotypes.

114. Develop "firewalls" between immigration enforcement and public services, so that all migrants in the European Union can seek access to justice and to social services without fear of being denounced to immigration enforcement authorities and deported.

115. Ensure that those who offer services, such as assistance to search and rescue operations, medical support, shelter and legal advice, are explicitly protected from prosecution under the facilitation directive.

Migrant workers

116. European Union member States should be weaned off their reliance on cheap labour provided by migrant workers in specific economic sectors and should ensure labour rights are upheld for all, including migrants, including irregular migrants, through full implementation of the employers sanctions directive and rigorous labour inspection. Long-term investment in enforcement of the labour and human rights of all workers, including migrant workers, whatever their status, will allow the Union to fill the inevitable increase in gaps in its labour markets in an efficient and organized way.

117. Improve accountability of violations of the rights of migrants, including through continued support and cooperation with the European Ombudsman and by strengthening the coordination of national human rights institutions.

118. Reconsider the general refusal of EUMS to ratify the International Convention on Migrant Workers.

2. Recommendations to specific European Union institutions

To the European Commission

119. **Lead the development of a coherent and rights-based migration policy, including a 25-year strategy for European Union institutions and member States.**

120. **Further develop existing initiatives to mainstream human rights into the work of the Directorate General for Migration and Home Affairs.**

121. **Investigate violations and promptly initiate infringement procedures against member States who violate the Charter of Fundamental Rights of the European Union with respect to the rights of migrants.**

122. **Step up work to explore the feasibility of new ways to provide legal avenues of migration for those in humanitarian situations and quickly implement reform.**

123. **Develop better policy coherence between the work of the different Directorate Generals of the European Commission in relation to migration. Aim to connect the humanitarian work of the Directorate General for Humanitarian Aid and Civil Protection, with the broader work of the Commission on migration, particularly the Directorate General for Migration and Home Affairs.**

124. **Provide support to member States on the integration of the Common European Asylum System into national law and its effective implementation.**

125. **Through the work of the Directorate General for Employment, Social Affairs and Inclusion, support member States in moving away from cheap labour predicated on the abuse of migrant workers towards a system of fair, organized and legal migration, through the repression of exploitative employers.**

126. **Lead efforts to counter negative anti-immigration discourses in order to facilitate and improve the integration of migrants in Europe.**

European Parliament

127. **Exercise democratic oversight of migration policies and practices, encouraging a prioritization of human rights concerns throughout.**

128. **Focus on improving democratic control and strengthening human rights due diligence and monitoring in relation to the development of external migration agreements under the Global Approach to Migration and Mobility.**

To FRONTEX

129. **Increase the resources and independence given to the FRONTEX Fundamental Rights Officer to continue and build upon work completed so far.**

130. **Ensure that Operation Triton upholds international standards in relation to protection at sea and that the full transition from Operation Mare Nostrum does not result in the avoidable loss of life of migrants in the Mediterranean Sea.**

131. **Use its coordination and information-sharing mandate to support the development of consensus and coherence in relation to search and rescue zones and disembarkation practices.**

132. **Refrain from using the term "illegal" in reference to migrants at all times.**

133. **Ensure that allegations of human rights violations committed in the context of FRONTEX operations are adequately followed-up on. Establish and adequately fund the individual complaints mechanism for violations of the human rights of migrants**

(as provided for in article 26 (a) (1) of Regulation (EU) No. 1168/2011), as recommended also by the European Ombudsman in the context of its inquiry regarding case OI/5/2012/BEH-MHZ. Individuals and their families, as well as civil society organizations should have access to the complaint mechanism and to adequate reparations.

134. **Pursuant to article 3 (1) (a) of Regulation (EU) No. 1168/2011, suspend or terminate operations in cases of persistent and serious violations.**

To the Council of Europe

135. **Support the European Union in mainstreaming human rights concerns into migration and border management policies and implementing the relevant, recent judgements of the European Court of Human Rights, therefore developing further synergies between the two organizations.**

To the European Union Agency for Fundamental Rights

136. **Continue its vital work in developing the evidence base related to key migration and human rights issues, including border management, integration and access to justice. Raise the profile of these issues and report on key challenges.**

137. **Integrate follow-up to the 2014 Fundamental Rights Conference into that work.**

To the European Ombudsperson

138. **Continue its crucial work in establishing accountability for violations of migrants' rights.**

139. **Develop further cooperation between national human rights institutions and the European Ombudsperson on issues related to migration.**

Annex

[English only]

A. Additional sources consulted for the Special Rapporteur's report

1. In addition to the three country visits undertaken, as well as insight gained from the Special Rapporteur's on-going contribution to regional dialogues, the following sources were consulted:

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B. Key legal, institutional and policy developments since 2013

2. As discussed in the Special Rapporteur's 2013 report, there are a large number of legal, institutional and policy mechanisms that contribute to migration, border control and

asylum. The focus of the below section will be on the most pertinent developments since 2013.

1. Legal

Dublin III

3. The Dublin system was updated in 2013 by two EU directives, which form part of the most recent asylum acquis. The Eurodac regulations (Regulation (EU) No. 603/2013), established a database system whereby migrants are fingerprinted in their country of origin to ensure they can be returned to the country in which their asylum claim should be processed under Dublin. Regulation (EU) No. 603/2013 also updated the overall regulations governing the Dublin Regulations system. Following the passing of Dublin Regulation III and No. 603/2013, the recasted Dublin Regime came into force in January 2014.

4. The overall purpose of the updated regime is: to ensure that one Member State is responsible for the examination of an asylum application; to deter multiple asylum claims; to determine as quickly as possible the responsible Member State to ensure effective access to an asylum procedure; and to ensure procedural safeguards such as the right to information, personal interview, and access to remedies as well as a mechanism for early warning, preparedness and crisis management.[8]

5. Some new provisions are included which could potentially improve the protection of the rights of migrants, including restrictions on the use of detention when transferring a migrant between countries, respect for the unity of the family and a duty on states to inform migrants of the implications of being transferred between countries. Under the regime one member state is responsible for the examination of an asylum claim and the normal process is that the country the migrant arrives in processes an asylum application. However under the regulations migrants cannot be returned to the countries they originally entered to have their claims processed if there are systemic failings within the asylum system.[9]

6. In addition, Dublin III introduces an early warning mechanism and aims to make it easier to detect problems in a member state's asylum system so that the EU Commission and the European Asylum Support Office (EASO) can provide early assistance before the situation degenerates.

EU Regulation 656/2014

7. As a response to protection at sea challenges, EU regulation on surveillance of the external sea borders in the context of Frontex co-operation was adopted in May 2014 and entered into force in July. It sets out rules for the interception of vessels during joint operations at sea, including for SAR situations and the disembarkation of intercepted or rescued people. The aim of the new Regulation is to resolve confusion over diverging national interpretations of international provisions on maritime surveillance by setting out clear rules to be laid out in Frontex operational plans and followed during Frontex joint operations.[10]

8. According to the regulation, if during a joint operation there is reason to believe that a vessel or persons on board are in an emergency situation, the maritime and aerial assets must contact the responsible Rescue Coordination Centre (RCC); they must transmit all

[8] Immigration Law Practitioners' Association, 2014, " Information sheet, Dublin III".
[9] UNHCR, 2014, "The Dublin Regulation".
[10] Amnesty International, 2014, "Lives adrift: Refugees and migrants in peril in the central Mediterranean".

available information to the RCC, place themselves at its disposal and follow its instructions to assist with the rescue operation and disembark the rescued persons in a place of safety. This procedure is detailed in the operational plans of each Frontex-coordinated operation.[11]

Seasonal Workers Directive (2014/36/EU)

9. This Directive, passed in February 2014, was the first directive on legal migration to focus on low-skilled economic migration. Member States have until 30 September 2016 to transpose the provisions of the Directive into their national laws, regulations and administrative provisions. Its declared aim is to set out "fair and transparent rules of entry and stay of seasonal workers who are not EU citizens". It is destined for seasonal workers who retain their principal place of residence in a country outside of the EU and stay temporarily in the EU to carry out a "seasonal" activity such as agriculture and tourism. Its seeks to establish "a common set of rights to which seasonal workers are entitled during their stay in the EU in order to avoid their economic and social exploitation". It therefore stipulates that workers are entitled to equal treatment with nationals of the host member state with regard to terms of employment. This includes working conditions, leave and holidays, health and safety requirements at the workplace and social security.

10. In contrast to these positive provisions in relation to the human rights of migrants, the Seasonal Workers Directive also aims to provide for incentives and safeguards to prevent temporary stays from becoming permanent. However those who are already in the EU would be allowed to extend their contract or change their employer at least once. Re-entry of those who return every year is to be facilitated in order to promote circular migration. While the Directive provides a framework, again it leaves the Member States to determine how many workers they admit and allows them the latitude to reject applications if EU workers are available.[12]

New mobility partnerships and readmissions agreements under the GAMM

11. The GAMM framework has four priorities: better organising legal migration and fostering well managed mobility; preventing and combating irregular migration and eradicating trafficking in human beings; maximising the development impact of migration and mobility; and promoting international protection and enhancing the external dimension of asylum.

12. The GAMM is constituted by a complex and vast array of loosely associated policy and legal mechanisms, as well as a number of different migration related projects within origin, transit and destination countries, including those related to South-South migratory flows. The GAMM includes 8 regional dialogues, which are designed to foster coordinated action between the EU and other continents at the regional level. Also under the GAMM, sit plurilateral and bilateral agreements between EU and EUMS and specific third countries. In the period 2012-2013, the Commission supported more than 90 migration-related projects with a collective budget of over € 200 million.[13]

13. Mobility Partnerships are a key tool and have been prominent in the EU's recent external dialogue about its migration and border management. They encompass a broad range of issues ranging from development aid to temporary entry visa facilitation, circular migration programmes and the fight against unauthorised migration, including cooperation

[11] European Commission, 2015, "Reply by DG Migration and Home Affairs to the questions by the Special Rapporteur on the human rights of migrants".

[12] OHCHR Regional Office for Europe, 2015, "Overview of EU Migration".

[13] European Commission, 2015, "GAMM Implementation Report".

on readmission. The EU holds these Mobility Partnerships with 8 countries. The EU has signed Mobility Partnerships with Morocco, Tunisia, Azerbaijan and Jordan since the Special Rapporteur's report in 2013. Furthermore, a Common Agenda on Migration and Mobility has been signed with Nigeria. Discussions are ongoing with Belarus on developing a Mobility Partnership.

14. Since 2012, the EU has also signed readmission agreements with four new countries Armenia, Azerbaijan, Turkey and Cape Verde, which all entered into force in 2014.[14]

2. Institutional

Search and rescue

15. The further reinforcement of the SAR services provided to migrants in the Mediterranean Sea are an important institutional development since 2013. The Italian rescue operation, Mare Nostrum, was launched in response to the hundreds of migrants who died in shipwrecks near the island of Lampedusa in October 2013. Mare Nostrum is reported to have saved the lives of as many as 160,000 migrants in the Mediterranean Sea in 2014. Despite pressure from civil society organisations, the Italian government ended Mare Nostrum in December 2014 because of high costs, the lack of support from other European countries for the operation and the initiation of Operation Triton.[15]

16. Mare Nostrum was a specific mission run by the Italian Navy. It was initiated despite pre-existing regional discussions about a Frontex operation and was described by Italian Coast Guard Admiral Pettorino as "a very important message of humanity and civil responsibility sent out by the Italian Government". It wasn't a totally new operation but was a significantly scaled up version of the Italian naval operation "Constant Vigilance".

17. Reported operating budgets for Mare Nostrum differ. Media reports suggested that it cost EUR 9 Million per month to run, whereas funding granted by the European Commission Borders Fund (EBF) suggested that EUR 1.8 Million would cover a month's worth of running costs. More than 900 personnel are estimated to be involved in the implementation of Mare Nostrum, which stretched far beyond the territorial waters of Italy's territorial waters and continuous zone. The operation deployed a large number of navel ships, as well as helicopters, airplanes and drones.[16]

18. Debates have been witnessed within Europe about whether Mare Nostrum was a pull factor for irregular migrants. Pettorini asserted that the operation was not a migration pull factor and that those on boats were motivated by the humanitarian situations they were fleeing. However other reports have discussed how smugglers abused the presence of Mare Nostrum by making shorter journeys to where they knew migrant would be rescued allowing them to facilitate more sea-based trips.[17]

19. Operation Triton, a Frontex initiative, was launched as a response to the continued loss of life at sea in the Mediterranean in 2014. The Triton joint operation, coordinated by

[14] European Commission, 2015, "Reply by DG Migration and Home Affairs to the questions by the Special Rapporteur on the human rights of migrants".

[15] Amnesty International, 2014, "Italy: Ending Mare Nostrum search and rescue operation would 'put lives at risk'".

[16] Carrera, S & den Hertog, L., CEPS, 2015, "Whose Mare? Rule of law challenges in the field of European border surveillance in the Mediterranean".

[17] IOM, 2014, "Interview with Admiral Pettorino, Italian Coast Guard: "Saving Lives is Our Only Concern" & Carrera, S & den Hertog, L., CEPs, 2015, "Whose Mare? Rule of law challenges in the field of European border surveillance in the Mediterranean".

Frontex, started its activities in the Central Mediterranean in support of the Italian efforts on 1 November 2014.[18]

20. Whilst Operation Triton has been dubbed as a replacement for Mare Nostrum, the reality is more complex. When Mare Nostrum was launched there were two Frontex joint operations in existence and dialogue was on going about further community support. In 2014, the Italian Government started to lobby other EUMS for financial and technological support for an "exit strategy" from Mare Nostrum. Alongside this lobbying, other EUMS were trying to build support for additional resources for Frontex to support rescue at sea. As the concept of a Frontex joint operation developed there was significant confusion about the relationship between such a mission and the existing efforts of the Italian Government. It became clear that Frontex was not prepared to provide an operation as comprehensive as Mare Nostrum because of the high costs and that Operation Triton whilst providing SAR services would have much more of a focus on border management.[19]

21. With the support of 18 EUMS, as well as a number of EU agencies and international organisations, and a monthly budget of around EUR 2.9 million, Operation Triton was launched in November 2014. Despite reported disagreement about the continuation of Mare Nostrum within Italy and pressure from human rights organisations, the Italian Government ceased their SAR services but contributes to Operation Triton.[20]

22. Operation Triton covers a narrower geographic focus but coordinates the deployment of 2 fixed wing surveillance aircrafts, 3 patrol vessels, 2 coastal patrol vessels, 2 coastal patrol boats and 1 helicopter in order to assist Italy in coping with the on-going migratory flows. In addition, Italian assets form part of the operation. Five debriefing teams are deployed to support the Italian authorities in collecting intelligence on the people-smuggling networks operating in origin and transit countries as well as two screening teams.

23. The core objective of the Triton operation is to provide assistance to the Italian authorities' efforts to ensure effective surveillance of the maritime borders and in addition provides assistance to any person on board a vessel in distress.[21] Figures published by the European Commission on January 13 2015 indicated that since the launch of the Triton joint operation on 1 November 2014, the participating authorities have dealt with 130 incidents of which 109 were SAR cases. 16,402 people were detected, including 15,325 persons found on boats in distress. In addition to that, 57 facilitators were arrested. The EU has cited the operation as an example of solidarity and best practice sharing between Member States.[22]

European Border Surveillance System (EUROSUR)

24. The EUROSUR legislation discussed in became formally operational on 1 December 2013. It is designed to improve the information exchange and cooperation between border control authorities and will involve increased surveillance of the European Union's sea and land borders using a vast array of new technologies, offshore sensors and satellite tracking systems. Its "smart borders package", will create one of the world's largest

[18] Europa, 2015, "Questions and Answers: Smuggling of Migrants in Europe and the EU response"

[19] European Commission, 2015, "Reply by DG Migration and Home Affairs to the questions by the Special Rapporteur on the human rights of migrants"

[20] Carrera, S & den Hertog, L, CEPs, 2015, "Whose Mare? Rule of law challenges in the field of European border surveillance in the Mediterranean"

[21] Carrera, S & den Hertog, L, 2015, "Whose Mare? Rule of law challenges in the field of European border surveillance in the Mediterranean".

[22] Europa, 2015, "Questions and Answers: Smuggling of Migrants in Europe and the EU response

biometric databases, with as one of its key aims the identification of individuals who have overstayed their visas, together with the prevention of irregular migration. One of the three stated objectives of the EUROSUR system is to reduce deaths at sea contributes to protecting and saving the lives of migrants trying to reach European shores.

25. At European level, Frontex is establishing the European Situational Picture and the Common Pre-frontier Intelligence Picture, which will be continuously upgraded in 2014-2015. Frontex also established, as an initial service, the service for the "common application of surveillance tools", consisting of information derived from satellite imagery and from ship reporting systems together with the EU Satellite Centre and the European Maritime Safety Agency (EMSA).[23]

Frontex's Fundamental Rights Officer

26. Since the publication of the Special Rapporteur's 2013 report, the office of Frontex's Fundamental Rights Officer (FRO) has been more fully developed. The work of Ms. Inmaculada Arnaez Fernandez and those supporting her since the inception of the FRO mandate is considered an example of good practice. The Fundamental Rights Officer is involved in many activities of the Agency such as the establishment of a Code of Conduct for Joint Return Operations, the Vega handbook on children (soon to be finalised) and the establishment of a mechanism for monitoring fundamental rights. She is involved in preparing the operational plans for joint operations and she also carries out field visits to these operations. She reports to the Management Board at each of its meetings on joint operations, in particular any incidents reported during these operations, capacity building, as well as on relations with other agencies, such as the European Asylum and Support Office.[24]

The Fundamental Rights Agency

27. The EU's FRA has been active on the issues related to the human rights of migrants in relation to border management. Their 2014 annual conference focussed the human rights of migrants. The outputs of the conference reflected the key human rights concerns and a significant degree of commonality with the findings of the Special Rapporteur, as discussed in the policies and dialogues section below. In addition the agency have published a number of publications on key issues.[25]

3. Policies and dialogues

European Agenda on Migration

28. The European Commission launched the work on elaborating a European Agenda on Migration on 4 March 2015, which is expected to be adopted on 13 May. It aims to set out its ideas for a comprehensive, coherent and holistic approach to migration, covering both legal and irregular migration. It four main areas of focus are a common asylum system; a new policy on legal migration; fighting irregular migration and trafficking more robustly; and securing Europe's external borders.

[23] European Commission, 2015, "Reply by DG Migration and Home Affairs to the questions by the Special Rapporteur on the human rights of migrants".

[24] European Commission, 2015, "Reply by DG Migration and Home Affairs to the questions by the Special Rapporteur on the human rights of migrants".

[25] FRA, 2014, "Conference Conclusions".

European Council Strategic Guidelines

29. In its Conclusions of 26-27 June 2014, the European Council has adopted the new "Strategic Guidelines for Legislative and Operational Planning for the coming years within the EU's Area of Freedom, Security and Justice (AFSJ)". These Strategic Guidelines identified the need for an organised migration policy on both the basis of international protection and the long-term economic interests of the EU, as shown from the extracts below:

30. "Faced with challenges such as instability in many parts of the world as well as global and European demographic trends, the Union needs an efficient and well-managed migration, asylum and borders policy, guided by the Treaty principles of solidarity and fair sharing of responsibility, in accordance with Article 80 TFEU and its effective implementation. A comprehensive approach is required, optimising the benefits of legal migration and offering protection to those in need while tackling irregular migration resolutely and managing the EU's external borders efficiently.

31. To remain an attractive destination for talents and skills, Europe must develop strategies to maximise the opportunities of legal migration through coherent and efficient rules, and informed by a dialogue with the business community and social partners. The Union should also support Member States' efforts to pursue active integration policies which foster social cohesion and economic dynamism."[26]

The proposal for a holistic approach to migration from the European Parliament

32. In December 2014, the Civil Liberties Committee of the European Parliament adopted a resolution calling for a holistic EU approach on migration in the Mediterranean. The resolution includes sanctions for smugglers and human traffickers, and migration management agreements with third countries for cooperation and safe returns. It also calls for the strengthening of the border policy and security as well as enhancing the role of Frontex and European Asylum Support Office (EASO). Whilst the European Parliament has not yet passed the resolution, it suggests potential for the development of further political will in relation to the human rights of migrants.

EU Action Plan to counter migrant smugglers

33. The Action Plan, to be adopted in 2015, will focus on identifying and dismantling the network of criminals who make profit of people seeking protection and better life prospects in Europe, often exposing them to gross human rights violations. In doing so, it will fully take into account the need to respect fundamental rights of migrants and to avoid criminalization of those who assist them for humanitarian reasons.[27]

European Commission communication on EU Return Policy

34. In its 2014 Communication on EU Return Policy COM (2014) 199, the European Commission the Commission evaluated the Return Directive finding that it had effected legislative and practical changes in all Member States. It found that legislation in all Member States complies with the relevant rules fixed in Articles 16 of the Return Directive, whilst some practical shortcomings remain in a number of Member States. The Commission will follow up on all identified shortcomings.

[26] EUCO 79/14

[27] European Commission, 2015, "Reply by DG Migration and Home Affairs to the questions by the Special Rapporteur on the human rights of migrants".

35. In its upcoming "Return Handbook", due to be adopted in 2015, the Commission will expressly refer to relevant guidance documents from the Fundamental Right agency concerning the treatment of irregular migrants who are subject of return procedures. This handbook will also discuss key access to justice concerns in relation to migrants in situations of return.[28]

The draft students and researchers Directive

36. This draft legislation, proposed by the European Commission on 25 March 2013, aims to determine the conditions of entry and residence, and the rights, of students and researchers from non-EU countries to benefit from training and academic opportunities in the region. It recasts the existing Directives in this area with the main aim of facilitating admission and stay of these categories of third-country nationals in the EU. It is framed as a response to shifts in demographics and competition dynamics within the EU.[29] Whilst it is currently being negotiated by the European Parliament and the Council and is not adopted yet, the draft Directive recognises the role that non-EU nationals can play in responding to the demographic and societal shifts being seen in the EU.

The FRA annual conference

37. On 10-11 November, the European Union Agency for Fundamental Rights (FRA), together with the Italian Presidency of the Council of the EU, held its annual Fundamental Rights Conference, which was this year dedicated to the topic of fundamental rights and migration to the EU.

38. The event brought together over 300 EU and national decision makers, members of national parliaments, the judiciary, law enforcement agencies, and experts from international organisations, as well as national human rights bodies, civil society bodies and academics involved with migration issues on a daily basis. Speakers included EU Migration, Home Affairs and Citizenship Commissioner Dimitris Avramopoulos, Speaker of the Italian Chamber of Deputies Laura Boldrini, Italian Undersecretaries of State Senator Benedetto della Vedova and Domenico Manzione, MEP and Vice-Chair of the Committee on Civil Liberties, Justice and Home Affairs, Iliana Iotova, German Minister of State, Commissioner for Immigration, Refugees and Integration, Aydan Özoguz, FRA Director Morten Kjaerum, and Swedish Minister for Public Administration at the Ministry of Finance, Ardalan Shekarabi.

39. Participants agreed that the EU and its Member States should develop a more holistic approach to their migration and asylum policy. It was emphasised that fundamental rights are not just one element of such policies, but on the contrary form the normative framework in which they must be situated. It was emphasised at many points throughout the conference that the EU and its Member States need a comprehensive and sustainable migration policy, and that a new and positive narrative is necessary to counter the current negative image of migrants and migration that stresses the benefits of migration both to migrants themselves and to the countries hosting them. This is particularly true at present, as projected demographic trends in the EU mean that many areas of the economy may face an increasing shortage of labour in the coming years. Specific and practical measures are

[28] European Commission, 2015, "Reply by DG Migration and Home Affairs to the questions by the Special Rapporteur on the human rights of migrants".

[29] European Commission, 2013, "DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training voluntary service and au pairing".

needed to promote equal treatment, increase the political participation of migrants, and mainstream fundamental rights into integration policies at national, regional and local level [50]

European Migration Forum

40. The first meeting of the European Migration Forum (EMF) took place on the 26/27 January 2015 in Brussels. The EMF addressed issues and challenges in the management of mixed flows of migrants and asylum seekers across the Mediterranean. The discussions were structured around four thematic Workshops: First, access to the asylum procedure at the borders; Second, integration of beneficiaries of international protection; Third, a comprehensive approach to countering migrant smuggling; and Fourth, providing adequate information in countries of origin and transit.

41. Conclusions from the Forum included: to take stock of current migration laws and policies; to further develop Member States accountability in the implementation of EU laws, and independent monitoring mechanisms of border controls, surveillance, SAR, visa and asylum policies; to develop legal and regular channels to Europe for protection and employment; and to respect rights of undocumented migrants and de-criminalise migration and humanitarian assistance, including a firewall between immigration control and access to justice and services.[51]

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[50] FRA, 2014, "Conference Conclusions"

[51] Carrera, S & Huddleston, 2015, "European Migration Forum, Conclusions and Policy Recommendations"

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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the human rights of migrants, François Crépeau

Addendum

Mission to Sri Lanka*

Summary

The Special Rapporteur on the human rights of migrants conducted an official visit to Sri Lanka from 19 to 26 May 2014, where he visited Colombo, Kurunegala, Kandy, Tangalle and Galle, and held consultations with government officials, the United Nations country team, the Human Rights Commission of Sri Lanka, diplomats, recruitment agents, trade union representatives, civil society organizations and migrants.

The focus of the visit was labour migration from Sri Lanka and related recruitment practices, and their impact on the human rights of migrants. The Special Rapporteur welcomes the efforts undertaken by the Sri Lankan authorities to regulate labour migration and protect the rights of its citizens who migratee abroad, but notes the need to fully implement a human rights approach in that respect.

The Special Rapporteur also looked into the situation of migrants in Sri Lanka. He notes the need to regulate and monitor the detention of migrants in Sri Lanka, and to revise constitutional provisions which discriminate against migrants.

* The summary of the present report is circulated in all official languages. The report itself, which is annexed to the summary, is circulated in the language of submission only.

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Annex

[*English only*]

Report of the Special Rapporteur on the human rights of migrants, François Crépeau, on his mission to Sri Lanka (19–26 May 2014)

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I. Introduction

1. The Special Rapporteur on the human rights of migrants, François Crépeau, conducted an official visit to Sri Lanka from 19 to 26 May 2014 at the invitation of the Government. The main focus of the visit was on labour migration from Sri Lanka and recruitment practices, but the Special Rapporteur also looked into the situation of migrants in Sri Lanka, particularly those in detention.

2. During the mission, the Special Rapporteur met government representatives including representatives of the Ministry of Foreign Employment Promotion and Welfare, the Ministry of Labour and Labour Relations, the Ministry of External Affairs, the Ministry of Justice, Department of Immigration and Emigration, and the Sri Lanka Bureau of Foreign Employment (SLBFE); members of the United Nations country team, the Human Rights Commission of Sri Lanka, the diplomatic community, civil society organizations and recruitment agencies; and trade union representatives, academics, families of migrants and returned migrants. He also visited Mirihana detention centre, Boossa prison, the Sahana Piyasa welfare centre in Katunayake, SLBFE provincial centres and training centres in Kurunegala and Kandy, and the migrant resource centre in Tangalle.

3. Owing to the Special Rapporteur's focus on recruitment, at his initiative, the Ministry of Foreign Employment Promotion and Welfare organized a workshop during the visit to discuss recruitment practices. The workshop was attended by, inter alia, representatives of the Government, recruitment agencies, the United Nations country team and civil society. Issues discussed included the idea of a "clearing house" for destination countries, a multi-State and stakeholder approach to be promoted through bilateral and multilateral agreements, an awareness-raising programme for all relevant stakeholders and the need for global insurance coverage for all migrant workers.

4. The Special Rapporteur expresses his appreciation for the cooperation extended to him by the Government prior to, throughout and after the visit. He also thanks the United Nations country team for their valuable support and assistance.

II. General background: migration in Sri Lanka

5. The Middle East has been the main market for Sri Lankan labour migration since the late 1970s. The main destination States include Jordan, Kuwait, Qatar, Saudi Arabia and the United Arab Emirates. The level of migration from Sri Lanka is increasing and is playing a key role in the economic development of the country. Remittances form 33 per cent of the foreign exchange in Sri Lanka, the 1.8 million foreign workers form 24 per cent of the labour force and remittances form 8.3 per cent of gross domestic product. In 2010, almost 60 per cent of remittances came from the Middle East, 18 per cent from the European Union and 6 per cent from the Far East. Remittance inflows have increased steadily over the past 30 years. Around 6.5 per cent of households in Sri Lanka receive remittances from overseas. Migrant households have higher spending on household expenditure such as food, education, health care and housing.[1]

6. More than 293,000 Sri Lankans migrated for work in 2013. Remittances have become the key source of foreign exchange earnings in Sri Lanka, as well as a source of economic dependency for nearly one third of the population. Over the years, a large

[1] SLBFE statistical report

recruitment industry has developed in Sri Lanka and labour migration has had an impact on economic activities such as recruitment, airline services, banking and insurance.[2]

7. There is a large mismatch between the international demand for jobs and the supply capabilities of Sri Lanka, as demand is mainly for skilled labour, while Sri Lankan migration is concentrated on housemaids and low-skilled workers, thus creating problems relating to their protection and low remuneration. The Government of Sri Lanka has placed particular emphasis on increasing the migration of skilled workers, including through better vocational training. Low-skilled workers are more likely to face human rights violations, including harassment and abuse in the workplace.

8. Root causes of migration from Sri Lanka include unemployment or underemployment, especially for women, youth and minorities. Migration has acted as a safety valve for unemployment in the country. Sri Lanka has made significant investments in health and education and social development policies, but a large number of Sri Lankans still see migration as the best solution for their own circumstances.

9. The female unemployment rate in Sri Lanka is almost double that of the male unemployment rate,[3] forcing many women to migrate to find work. The majority of migrant women belong to disadvantaged communities where traditional livelihoods are not viable, so they migrate owing to lack of access to regular and substantial income and the inability to bear the rising cost of living. While the main reason to migrate is economic hardship, other frequent reasons include ambitions to build a house, or to educate their children. Other push factors include debt, domestic violence and alcoholic husbands. Women have dominated the foreign employment market for Sri Lankans, mainly owing to high demand for domestic workers in the Middle East. However, recent statistics show that this has changed and over 50 per cent of Sri Lankan migrants are now men.[4]

10. During the period of conflict in Sri Lanka, a considerable number of Tamils migrated from the country. Lack of economic opportunities and livelihood continues to be a determining factor which pushes Tamils and other minorities to seek opportunities outside Sri Lanka.

11. The Government offers services for Sri Lankan migrants, such as insurance andpension schemes, and education scholarships for their children. However, the large number of migrants has great social consequences for the families left behind. Lack of reliable, accessible information about migration also frequently leads to abuse and exploitation.

III. Normative and institutional framework for the protection of the human rights of migrants

A. International legal framework

12. Sri Lanka is a party to all the core human rights treaties except the Convention on the Rights of Persons with Disabilities and its Optional Protocol; the International Convention for the Protection of All Persons from Enforced Disappearance; the Second

[2] International Labour Organization, *Recruitment Practices of Employment Agencies Recruiting Migrant Workers* (2013).

[3] Ministry of Foreign Employment Promotion and Welfare, *Migration Profile: Sri Lanka* (2013) and *National Labour Migration Policy for Sri Lanka* (2008).

[4] Available from www.slbfe.lk/downloads/statis/2.pdf.

Optional Protocol to the International Covenant on Civil and Political Rights; the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.

13. Sri Lanka has ratified all eight International Labour Organization (ILO) fundamental conventions. However, it has not ratified ILO Conventions No. 97 concerning Migration for Employment (Revised 1949), No. 143 (1975) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, No. 181 (1997) concerning Private Employment Agencies, or No. 189 (2011) concerning decent work for domestic workers.

14. Sri Lanka has not ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, or the Protocol against the Smuggling of Migrants by Land, Sea and Air, both supplementing the United Nations Convention against Transnational Organized Crime. Neither has it ratified the Convention relating to the Status of Refugees and its 1967 Protocol, or the Convention on the Reduction of Statelessness.

B. Regional consultative processes

15. In 2014–2015, Sri Lanka is chairing the Colombo Process, which comprises Afghanistan, Bangladesh, China, India, Indonesia, Nepal, Pakistan, the Philippines, Sri Lanka, Thailand and Viet Nam. The Colombo Process is a regional consultative process on the management of overseas employment and contractual labour for countries of origin in Asia. Sri Lanka is also a member of the Abu Dhabi Dialogue, which comprises all the Colombo Process members and Bahrain, Kuwait, Malaysia, Oman, Qatar, Saudi Arabia, Singapore, the United Arab Emirates and Yemen.

16. As Chair of the Colombo Process, Sri Lanka is working towards establishing more links with destination States and the Abu Dhabi Dialogue, and is focusing its chairmanship on, inter alia, ethical recruitment and the reduction of recruitment fees. Sri Lanka has made efforts for countries of origin to agree on a common standardized work contract, and will use it to negotiate with destination States that are members of the Abu Dhabi Dialogue. The Special Rapporteur welcomes the initiative and notes the potential to enhance cooperation with other Asian countries of origin for a common platform on labour migration — including a standard contract, agreed labour conditions, social protection, insurance provisions, etc. — which could serve as a basis for negotiations with countries of destination , including those in the Abu Dhabi Dialogue.

C. National legal and institutional framework

1. National laws

17. The Constitution of Sri Lanka was adopted in 1978. Chapter III is dedicated to fundamental rights. According to article 12 (1), all persons are equal before the law and are entitled to the equal protection of the law. Article 12 (2) provides that no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds; and article 12 (3) provides that no person shall, on the grounds of race, religion, language, caste, sex or any one of such grounds, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion.

18. The Sri Lanka Bureau of Foreign Employment Act 21 of 1985 (amended in 1994 and 2009) is the primary piece of legislation that applies to Sri Lankan workers migrating for overseas employment. Its objectives, as set out in section 15, include promoting and developing employment opportunities for Sri Lankans outside Sri Lanka; assisting and supporting foreign employment agencies in their growth and development; regulating the business of foreign employment agencies which recruit Sri Lankans for employment outside Sri Lanka; issuing licences to foreign employment agencies; setting standards for and negotiating employment contracts; entering into agreements with foreign authorities, employers and employment agencies; formulating and implementing a model employment contract which ensures fair wages and employment standards; undertaking the welfare and protection of Sri Lankans employed abroad; training and orientation of Sri Lankans going abroad for work; and providing assistance to Sri Lankans going abroad for employment. The act does not cover migration to Sri Lanka and it does not have a strong human rights basis. The Special Rapporteur regrets the lack of a comprehensive law to protect the rights of migrants.

19. The Ministry of Foreign Employment Promotion and Welfare has prepared a new piece of legislation entitled "Sri Lanka Employment Migration Authority Act" to set up an authority on migration to replace SLBFE, which would provide a more overarching role for the Ministry in various components of the industry, including with regard to migration to Sri Lanka. The Act provides for the establishment of a national advisory council on employment migration, a Sri Lanka employment authority, a Sri Lanka employment migrants foundation (Rata Viruwo), an overseas Sri Lankan foundation, and a national chamber of licensed foreign employment agencies. It also provides for the establishment of a workers' welfare fund and a foreign employment promotion fund.

20. Part VIII of the draft Act, "Regulation of outward migration", sets strict regulations for migration from Sri Lanka. Its article 73 (1) provides that all Sri Lankans leaving for work outside Sri Lanka shall register with the Authority, pay a fee and obtain departure approval by the Authority. Article 73 (4) provides that no Sri Lankan shall leave for work outside Sri Lanka unless such person is in possession of a valid Certificate of Departure Registration issued by the Authority and a passport duly stamped by the Authority. The Special Rapporteur notes that according to article 12 of the International Covenant on Civil and Political Rights, ratified by Sri Lanka, everyone shall be free to leave any country, including his own. The draft Act also provides, in article 73 (7), that no person shall change employer during a contract period unless for a compelling valid reason, and any person who contravenes that provision shall be guilty of an offence punishable under the Act. Article 74 provides that every Sri Lankan, of a category prescribed by the Authority, who leaves Sri Lanka for work shall inform the Divisional Secretary regarding every child below 6 years that the said person will leave behind in Sri Lanka, and they must register a guardian for such child before being permitted to leave Sri Lanka. Persons who fail to provide correct information on their children, as required, shall be guilty of an offence punishable under the Act. Furthermore, article 79 (1) provides that Sri Lankans who overstay in the destination country shall be guilty of an offence. The Special Rapporteur would like to stress the fact that migrants often change employers due to abuse or non-payment of salaries, and overstay because their employers do not pay their return ticket, or because their passport is confiscated or they do not obtain the required exit permit. Those provisions are therefore very worrying. At the time of the visit, the new Act was being reviewed and was expected to come into force before the end of 2014. The Special Rapporteur urges the Sri Lankan authorities to revise the draft Act to ensure a human rights-based approach to migration.

21. The Penal Code (Amendment) Act No. 16 of 2006 strengthened the provisions on trafficking, in order to bring the definition into line with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the

United Nations Convention against Transnational Organized Crime (the Palermo Protocol) and criminalize debt bondage, forced or compulsory labour and slavery.

22. The Immigrants and Emigrants Act, 1949 regulated the detention and deportation of non-citizens, as well as the departure of persons from Sri Lanka.

2. National institutions and policies

23. The Ministry of Foreign Employment Promotion and Welfare, set up in 2007, is the lead ministry responsible for labour migration. The creation of the Ministry is stated to be an indication of the priority given to labour migration in Sri Lanka. The Ministry is responsible for policy formulation, planning, monitoring and financing the setting up of a sound mechanism for promoting foreign employment.

24. SLBFE., established in 1985, within the purview of the Ministry of Foreign Employment Promotion and Welfare (before 2007 the Ministry of Labour), is a public corporation tasked with regulating the foreign employment industry in Sri Lanka and enforcing the provisions of the Sri Lanka Foreign Employment Bureau Act. The Special Rapporteur has received reports that the Bureau's main functions, namely regulation, employment promotion and worker welfare, are not delineated properly. Additionally, although it is supposed to regulate them, recruitment agents are overly represented on the Bureau's Board of Management, which contains no migrant worker representation. The Special Rapporteur hopes the new Employment Migration Authority Act will ensure proper delineation of the new Authority's functions, with balanced representation on the Board, including for migrant workers. The draft Act provides that the Board will have 11 members, all appointed by the Minister.

25. The Sri Lanka Foreign Employment Agency was established in 1996. It is a subsidiary of SLBFE, and is a government-owned licensed recruitment agency, headed by a chairman appointed by the SLBFE Board of Management. It functions in association with local and foreign employment agencies to secure employment opportunities for Sri Lankan youth, with full State intervention.

26. The Department of Immigration and Emigration, under the Ministry of Defence, facilitates Sri Lankan workers' going abroad by issuing travel documents on the basis of birth certificates and identity cards. It has an important role to play to prevent travel documents being issued on the basis of forged documents. This sometimes happens, making it possible for children under the age of 18 to migrate for work. The Department is also responsible for detaining and removing from Sri Lanka undesirable persons who are not citizens of Sri Lanka.

27. The Ministry of Labour and Labour Relations also has a role to play in migration from Sri Lanka. It has officers posted in labour sections (labour welfare units) in Sri Lankan diplomatic missions in destination countries, along with SLBFE officers, to manage matters relating to migrant workers overseas.

28. The Human Rights Commission of Sri Lanka was established by Act No. 21 of 1996. The Act provides that the Commissioners shall be appointed by the President, on the recommendation of the Constitutional Council. The Commission has been accredited with B status, not fully in compliance with the Paris Principles relating to the status of national institutions: there are plans to make it compliant. It has undertaken work in relation to the human rights of migrants, notably concerning migrants detained in Sri Lanka and Sri Lankans migrating abroad for work, and it established a new focal point on migrant issues in 2012. The Special Rapporteur urges the Commission to continue to expand its work on the human rights of migrants. He also urges the Government to fully take into account the Commission's recommendations and to consult the commission in its work on migrants.

29. The National Advisory Committee on Labour Migration was established in 2010 with the objective of dealing with migration issues in a systematic manner. It is chaired by the Minister of Foreign Employment Promotion and Welfare, and comprises policy makers, scholars and practitioners, including two non-governmental organizations and a trade union appointed by the Government. It meets twice a month. In addition to the Advisory Committee, an interministerial committee was set up with all the ministries and government departments concerned in order to ensure coordination amongst them. The Special Rapporteur urges the Government to enhance its collaboration with a plurality of civil society organizations, rather than simply selecting two of them to participate in the Advisory Committee.

30. The Ministry of Foreign Employment Promotion and Welfare developed the National Labour Migration Policy of Sri Lanka in 2008, with technical assistance from ILO. Its implementation is monitored by the National Advisory Committee on Labour Migration. The Policy is aimed at developing a long-term vision for the role of labour migration in the economy; enhancing its benefits for the economy, society, migrants and their families and minimizing its negative impacts; and protecting the human and labour rights of migrants. It highlights the importance of regulating the recruitment industry in order to enhance its governance and the protection and empowerment of migrants.

31. The Special Rapporteur welcomes positive developments, such as the 2008 National Labour Migration Policy, the 2013 Code of Ethical Conduct for Licensed Foreign Employment Agencies and the 2014 Operational Manual for Labour Sections of Sri Lankan Diplomatic Missions in Destination Countries. However, he notes the need to fully implement those initiatives, involving all relevant stakeholders, including civil society organizations.

32. Other relevant policies include the Migration Health Policy, the National Strategy on Technical and Vocational Education for Vulnerable People in Sri Lanka, the National Human Resources and Employment Policy (2012), the National Decent Work Policy and the Development Framework (2006–2016) and the National Action Plan for the Promotion and Protection of Human Rights 2011–2016, which includes a section on the rights of migrant workers.

IV. Recruitment process

A. Introduction

33. The recruitment of Sri Lankans wishing to migrate for work takes place through private recruitment agencies (62 per cent), the government recruitment agency (Sri Lanka Foreign Employment Agency) (1.5 per cent), or informal networks or personal contacts (36 per cent). The majority of potential migrants rely on informal networks for information on job placements. The risks involved include bogus recruitment agencies and moneylenders who give loans to migrants at higher interest rates.[5]

34. When a licensed agency receives a job order from a company abroad, authenticated by the Sri Lankan mission in that country, it is approved by SLBFE in order to be advertised. SLBFE can reject the job order if the terms and conditions of employment are not satisfactory, if the workers are exposed to serious risks or if the employment is not regulated by the law of the host country. However, the last point does not apply to domestic workers, whose work in many countries is not covered by labour laws. When the agency

[5] See *Migration Profile: Sri Lanka*.

selects a domestic, low- and semi-skilled worker, that person is referred for pre-departure training. The contract is explained in the worker's language, and signed at an SLBFE office in the presence of an SLBFE officer and the agent. The registration fee is paid, and final approval is received from SLBFE. For persons migrating on their own, the process includes authentication of documents by the Sri Lankan mission in the destination country, pre-departure training, documentation and screening, delivery of visas and contracts, and payment of the registration fee. While those are good initiatives aimed at preventing the exploitation of Sri Lankan workers, the Special Rapporteur heard numerous allegations of corrupt officials bypassing those procedures, as well as of economic incentives being offered in order to lure people into accepting false promises. He also heard reports that the contract is not always translated into a language that the migrant understands. He urges the Sri Lankan authorities to ensure that is not the case, and that migrants are given a copy of the contract in their own language and receive information on how to complain if the contract is not respected.

35. Migrants often suffer abuse and exploitation in Sri Lanka during the recruitment process. Some lack information about their jobs and salaries before they leave, others report having signed a contract in Sri Lanka which was replaced by a different contract upon arrival in the destination State, with a lower salary and a different job description. As migrants often cannot change jobs without the agreement of their employer, they become highly vulnerable to abuse and less likely to report violations. In many cases, this will amount to trafficking as defined in the Palermo Protocol, since migrants are recruited by means of deception to achieve the consent of a person who has control over another person for the purpose of labour exploitation and forced labour. In this respect, the Special Rapporteur welcomes the anti-trafficking task force chaired by the Ministry of Justice and urges the authorities to prosecute and punish cases of trafficking effectively, including cases of trafficking for labour exploitation and forced labour.

B. Role and regulation of recruitment agencies and sub-agents/brokers

36. Many of the problems migrants face in the destination country relate to the recruitment process in Sri Lanka. Recruitment agencies are involved in many steps of the recruitment process, such as the signing of contracts, pre-departure training, grievance handling, conciliation and repatriation.[6] Around 60 per cent of licensed recruitment agencies are located in the Colombo district. This leads to disparities between the regions and could be one reason why so many prospective migrants rely on informal networks when looking for jobs abroad. Many also find the recruitment process cumbersome and time-consuming. Better regulation of recruitment agencies in Sri Lanka would be an important tool in combating the exploitation of migrants in destination States.

37. As noted in the National Labour Migration Policy, malpractices by private recruitment agencies and gaps in the regulatory framework for sub-agents lead to exploitative and abusive situations for migrant workers. The lack of a proper monitoring mechanism for licensed agencies is also noted in the Policy. The Special Rapporteur heard many allegations in that respect from returned migrants and family members of migrants. Agents and sub-agents deceive prospective migrants about the nature and conditions of work they will perform, including wages. The role of private recruitment agencies and sub-agents needs to be better regulated and monitored. The Special Rapporteur therefore welcomes the rating system for licensed recruitment agencies introduced by SLBFE in 2009 in order to identify and promote the better agencies and attempt to minimize the

[6] See ILO, *Recruitment Practices of Employment Agencies Recruiting Migrant Workers*.

negative impact of exploitative agencies. A system of awarding a maximum of five stars was initiated in 2013. He also notes that licences need to be renewed every year and that the criteria for renewal are based on the number of complaints against the agency. Additionally, the Ministry of Foreign Employment Promotion and Welfare has introduced a blacklisting system for recruitment agencies.

38. The Special Rapporteur was informed that when a complaint is lodged against a recruitment agency, a mobile phone text message is sent to the licensed agent, who is required to reply within 48 hours. If no reply is received, or the agency cannot prove it has not done anything wrong, the licence will be suspended and an inquiry will be initiated. The Special Rapporteur welcomes information from the Government that it is attempting to introduce an annual training programme for agents, which they will need to undertake when they come for the annual renewal of their licence. The Special Rapporteur hopes those initiatives will contribute to better recruitment agencies and fewer human rights violations.

39. The Association of Licensed Foreign Employment Agencies (ALFEA) was established under the Sri Lanka Bureau of Foreign Employment Act No. 21 of 1985. Its objective is to ensure and enforce best ethical practices for the foreign employment trade by strict disciplinary control of all stakeholders. Only about 300 of the 1,000 estimated licensed recruitment agents in Sri Lanka are members of ALFEA, owing to a clause in the 2009 amendment to the Act which changed the mandatory requirement for all licensed recruitment agents to join the Association. The draft Employment Migration Authority Act provides that all licensed agents must become members of a new association which will replace ALFEA, the National Chamber of Licensed Foreign Employment Agencies. The Chamber will inter alia ensure the strict observance by its members of the Code of Ethical Conduct for Licensed Foreign Employment Agencies.

40. Brokers, or sub-agents, who are not licensed or accountable to the Sri Lankan authorities often engage in irregular recruitment practices. In 2013, the Government made an attempt to regulate them by requesting them to register with SLBFE. Over 5,000 sub-agents registered. The Special Rapporteur notes the need to ensure stricter regulation of brokers/sub-agents. The draft Employment Migration Authority Act allows for the establishment of branches of the recruitment agencies, and it is believed that that will reduce the use of sub-agents.

C. Access to an effective remedy

41. The Special Rapporteur welcomes the work of SLBFE on conciliation and dispute settlement, including the electronic registration of complaints, which are accessible in the diplomatic missions and SLBFE regional offices. He was informed that all of the more than 3,500 pre-departure complaints from 2013 had been settled; being cheated of money was the most frequent violation reported. The Special Rapporteur is concerned, however, about reports of the ineffective handling of complaints received from migrants, inter alia due to inadequate staffing at SLBFE. Persons in rural areas, in particular, find it hard to follow up on their complaints. While in the past it was necessary to travel to Colombo to submit a complaint, it is now possible to submit complaints in district centres. However, the Special Rapporteur heard many complaints that the officers in the SLBFE Conciliation Division were not equipped with the necessary skills in complaint management, that it was difficult to complain or attend conciliation procedures in the regional offices, and that it was difficult for many to travel to Colombo.

42. Some migrants reported that they were not taken seriously by SLBFE, particularly poor and less articulate migrants. Those who were assisted by non-governmental organizations reported having more success in having their complaints registered. The

Special Rapporteur is also concerned about reports that persons who do not register with SLBFE when they migrate feel they are denied any assistance from the Bureau.

43. The Special Rapporteur was informed that returned migrants are often discouraged from complaining, either by husbands, family members or by other returnees whose complaints were fruitless. Some are forced by employers to sign documents in the destination State, most often in a foreign language, stating that they were well treated, in order to be allowed to return to Sri Lanka, and therefore SLBFE refuses to accept their complaints. The Special Rapporteur also heard reports of an insufficient time limit for returned migrants to obtain medical reports to claim insurance for accidents, and of many limitations in terms of benefits, including very low compensation for serious injuries as a result of ill-treatment by employers. The migrants are only insured for accidents and death, and the Special Rapporteur notes the need to expand the insurance coverage for migrant workers to global coverage, including proper medical insurance and adequate compensation for accidents. He also notes the need to make the SLBFE Welfare Fund more transparent, sharing information on the amount of money available in the Fund, and how it is spent.

D. Recruitment fees

44. The Sri Lanka Bureau of Foreign Employment Act, as amended in 2009, provides that no fee shall be charged by agencies other than an amount of Rs 3,000 to Rs 10,000, depending on the salary of the migrant worker. However, many migrants pay much higher fees to agents than those stipulated in the Act. Thirty per cent of the fee goes to the Workers Welfare Fund, which provides insurance for the workers in case of death, disability and illness, while 70 per cent goes to the agents as payment for having found the job.

45. Agents and sub-agents/brokers frequently overcharge prospective migrants, causing them to incur significant debt. Some prospective migrants rely on informal channels because of the high fees charged by private recruitment agencies. Many mortgage their lands to cover migration costs, take out loans or pawn jewellery,[7] owing to the difficulty many face in obtaining a bank loan to pay recruitment fees.

46. Pre-departure loans are provided to cover recruitment fees, except for domestic workers, who receive financial incentives to migrate.

47. The Special Rapporteur encourages Sri Lanka to ban recruitment fees for migrants, in accordance with ILO Convention No. 181, as the recruitment-related costs should be covered by the prospective employer.

E. Pre-departure training and information

48. Pre-departure training and information are provided to prospective migrants who are low- or semi-skilled and who migrate through official channels. The Special Rapporteur welcomes the provision of training, which can be an important tool to empower migrants and prevent abuse. However, some migrants note that the training is insufficient. For instance, training for domestic workers focuses on cooking and cleaning, with little language training and insufficient information on what to expect in the destination State, on their rights and on how to address violations of those rights. The Special Rapporteur also heard reports that some migrants do not even undergo the required training, as sometimes bribes are paid to get the training certificate. He urges the Sri Lankan authorities to prevent that from happening. Training and information sessions should be enhanced in order to

[7] *Migration Profile: Sri Lanka*

ensure that migration decisions are well informed, and that migrants have the necessary information on working conditions in the destination country, have the necessary skills, know their rights and how to seek help or lodge a complaint, and have the language skills to do so. In that respect, the Special Rapporteur welcomes the 24/7 hotline and the safe labour migration guide.

49. The Special Rapporteur visited the new migrant resource centre in Tangalle, which focuses on skills development and provides intensive English courses. This is the first such purpose-built centre in Sri Lanka; several more are to be developed in other regions. The Special Rapporteur hopes this will lead to better training and enhanced levels of skills for prospective migrants.

F. Consular assistance

50. Many Sri Lankan migrants report being deprived of the right to leave their place of work, non-payment of salaries, or having their passports confiscated. Other common violations reported are harassment, violence, threats, inadequate living conditions and difficult access to health care. Effective consular assistance is crucial to those migrants.

51. In Sri Lankan diplomatic missions in destination States, Ministry of External Affairs officials take care of consular issues, such as the issuing of passports, while SLBFE and Ministry of Labour officials deal with the welfare of Sri Lankan workers. The Special Rapporteur welcomes the appointment of welfare officers to serve in Sri Lankan missions abroad. However, although Sri Lankan diplomatic missions, especially those in the Middle East, are actively involved in the welfare of Sri Lankan migrant workers, there are still important gaps to be addressed. The Special Rapporteur met with returned migrants who had been detained for several months, with no visits from consular authorities. He has received numerous complaints about the lack of support from Sri Lankan diplomatic missions and considers that welfare services and consular assistance provided to Sri Lankan migrants in the destination State should be strengthened, particularly in countries with large numbers of Sri Lankan workers, by ensuring the presence of an adequate number of well-trained officers in the labour welfare sections. The Special Rapporteur heard complaints from some agents that the staff in the diplomatic missions do not handle complaints and welfare issues as they should, but rather ask the agent to solve problems instead of dealing with them themselves. Diplomatic missions need to enhance their role in the protection of migrant workers, including in cases of abuse, contract substitution, withholding of passports and wages, or repatriation. Additionally, the missions should have female officers to deal with cases of sexual abuse; provide a local 24/7 hotline free of charge; establish a roster of competent local lawyers; and conduct frequent visits to migrant detention centres.

52. The Special Rapporteur welcomes information received that the Sri Lankan authorities provide migrants with a SIM card so they can make phone calls. However, as mobile phones are frequently confiscated by employers, this is of no use for many migrants.

53. The second edition of the *Operational Manual for Labour Sections of Sri Lankan Diplomatic Missions in Labour Receiving Countries*, published in 2014, elaborated with assistance from ILO, provides guidance on, inter alia, handling complaints from migrant workers, repatriation of workers and ensuring a safe recruitment process. The Special Rapporteur encourages its full implementation, which would go a long way to assist Sri Lankan migrants in need.

G. Return and reintegration

54. The Special Rapporteur welcomes the increased focus on the effective reintegration of returned migrants, in accordance with the National Labour Migration Policy. Distressed or sick returnees can stay at the Sahana Piyasa welfare centre close to the Colombo and Mattala airports before they return home and the Special Rapporteur received information about reintegration programmes, including self-generating income projects. However, he notes that some returnees report that there are insufficient reintegration services, most importantly for those who may have experienced abuse abroad. The National Labour Migration Policy provides that the State shall ensure that the return and reintegration process takes place with full protection of rights and freedoms.

55. Some migrants return with little or no savings, or even indebted, unsuccessful in their migration project. Account must be taken of the economic, social and psychological dimensions of reintegration, especially for those who feel that their migration was a failure. Many have not acquired any skills, or have acquired non-marketable skills, despite having worked abroad for years, even decades. As their skills are not recognized in Sri Lanka, this often leads to re-migration. Most Sri Lankan migrants go overseas initially for a two-year contract period, but the Special Rapporteur met with returned migrants who had been away for as long as 30 years, with little to show for it in terms of savings, improved housing, skills, etc.

56. The Special Rapporteur was informed by the Government that 300 dead bodies come back to Sri Lanka every year. He heard many reports that migrants who die abroad are sometimes returned mutilated, some of them with missing organs. No autopsy is performed in Sri Lanka and the family is often not allowed to see the body. He urges the Sri Lankan authorities to systematically undertake independent autopsies and inform the families of the results.

H. Relationship with destination States

57. Although Sri Lanka and other countries of origin have a role in preventing abuse of their own nationals who migrate for work, the destination States are responsible for human rights violations committed against migrants on their territory. The Special Rapporteur heard many reports of abuses in destination States, including horrible stories of ill-treatment, such as migrants being set on fire and killed by their employer, or being forced to drink chemicals. Low-skilled migrants in particular are subject to high levels of human rights violations in many countries, including harassment, abuse and labour rights violations. Returned migrants also report that the Sri Lankan authorities are often not able to protect them in the destination States. The Special Rapporteur therefore notes the need to enhance cooperation with destination States to ensure that the rights of Sri Lankans are respected during the whole migration process.

58. Sri Lanka has entered into memorandums of understanding with Bahrain, Italy, Jordan, Libya and the United Arab Emirates, and a bilateral agreement with Qatar, and has recently signed an agreement with Saudi Arabia concerning domestic workers. Sri Lanka has also signed a government to government agreement via the Employment Permit Scheme with the Republic of Korea. The Special Rapporteur was informed that, although the memorandums of understanding/agreements provide for annual meetings, such meetings do not take place regularly with all the destination States.

59. The bilateral agreement with Saudi Arabia on domestic workers is a positive development. It requires both parties to adopt a standard employment contract, to use only licensed recruitment companies which follow ethical recruitment practices and use

regulated recruitment costs, and to allow the right to recourse. It provides that Saudi Arabia shall facilitate the opening of a bank account by the employer for the deposit of the domestic worker's salary and facilitate the issuance of exit visas. The standard employment contract states the monthly salary, and that the employer shall deposit the salary to the said account every month. It also provides that domestic workers shall have at least eight hours rest per day and one rest day per week, suitable and sanitary living quarters, adequate food or a monetary allowance for food, paid sick leave and medical expenses, and no deductions from the salary. Furthermore, the employer shall pay for the residence permit and exit visa, the passport and work permit shall remain in the worker's possession, and workers shall have free communication with their family and Sri Lankan diplomatic missions.

60. The Special Rapporteur urges Sri Lanka to pursue the conclusion of similar agreements with other destination States, and ensure their strict implementation. The agreements should include a uniform model contract for all workers, including domestic workers, which should ensure respect for and protection of their human rights. Labour contracts based on such a model should specify the job description, wages and labour conditions. The Special Rapporteur notes the importance of bilateral agreements and memorandums of understanding being formulated in a transparent manner with all key stakeholders involved, and of ensuring that they are accessible to the public.

61. In the meantime, the Sri Lankan authorities should cooperate closely with the destination States, ensuring that the contract which is signed in Sri Lanka, in the SLBFE offices, is shared with the destination State for quick electronic registration, in order to prevent contract substitution.

V. Women migrants and domestic workers

62. Sri Lankan women frequently suffer from a lack of equal access to employment opportunities owing to discriminatory social practices. While migration has opened up employment opportunities for many women, the majority migrate to work as domestic workers, although their proportion is decreasing. Domestic workers are particularly vulnerable to abuse and exploitation, owing to their worksite being a private household and to the informal nature of the work. The majority of women domestic workers have faced harassment in the workplace. Other complaints include absence of days off, absence of rest and sleep, non-payment of wages, verbal abuse, restricted communication and food deprivation.[5] Because of the financial incentives provided, women are sometimes sent abroad by their husbands or family members, who expect the women to send their salaries back home. Contracts for domestic workers cannot be terminated early, as the employer pays all the migration-related costs.

63. Domestic work is excluded from most of the labour laws in many countries, including Sri Lanka. The Special Rapporteur believes Sri Lanka would find it easier to negotiate the legal protection of Sri Lankan domestic workers abroad if it could show that that was not the case in Sri Lanka. Such protection should include a law on domestic workers and ratification of ILO Convention No. 189 (2011) on decent work for domestic workers.

64. Specific age limits are applied to women who wish to migrate from Sri Lanka as domestic workers, depending on the destination State. For Saudi Arabia, the minimum age is 25, for other countries in the Middle East 23 and for the rest of the world 21 years.

[5] See Caritas Sri Lanka, *Migration of Sri Lankan Women: Analysis of Causes & Post-Arrival Assistance*.

Additionally, a circular of January 2014 provides for a "family background report" to be prepared by the Ministry of Foreign Employment Protection and Welfare for women migrants seeking employment in the domestic domain. The report is prepared by ministry officials deployed at the divisional secretariat level. Women with children under 5 will not be "recommended" for migration, while mothers with children above 5 will only be recommended for migration if alternative care arrangements made are satisfactory for ensuring their protection. The Special Rapporteur was informed during his visit that so far in 2014, 756 women had not been recommended for migration.

65. The Special Rapporteur regrets the discrimination faced by Sri Lankan women in relation to the right to migrate. The fact that they have small children, or that many domestic workers suffer abuse and exploitation, including the tragic execution of Rizana Nafeek, cannot be used as a reason to deny them the right to leave their country as provided for in the International Covenant on Civil and Political Rights, which has been ratified by Sri Lanka. What the Government refers to as "traditional Sri Lankan values" do not trump human rights obligations that it has committed itself to upholding. Women's rights organizations in Sri Lanka are protesting against the above-mentioned circular, which reportedly is leading to irregular migration.

66. The Government informed the Special Rapporteur that there was a demand from society to regulate the migration of women with children in order to ensure the protection of those children. However, that was not reflected in any observation by members of civil society the Special Rapporteur met with, who were all against the circular. The Special Rapporteur has also been informed that, owing to access to forged documents and corrupt officials, the age limits and other recommendations in the circular are not properly implemented anyway. While the intentions of the Government of Sri Lanka that lie behind those restrictions seem to be good, aiming to protect those women and their children, restrictions on women's right to leave their country are not the right way to achieve such objectives. In fact, the Special Rapporteur was told that many women migrate in order to escape from family issues, including domestic violence. Sri Lankan men are also frequently victims of abuse and exploitation in destination States, and the Special Rapporteur recommends that Sri Lanka come up with a holistic approach to deal with exploitation of Sri Lankan migrants abroad, both men and women. He also urges the Government to focus on other means, such as creating more income-generating opportunities for women in Sri Lanka, including in rural areas, diversifying child-care support measures and enhancing gender equality and men's participation in their children's upbringing.

67. The draft Employment Migration Authority Act provides in article 74 a gender-neutral requirement for Sri Lankans migrating for work to inform the Divisional Secretary about any child under 6 years that they will be leaving behind in Sri Lanka, and to register a guardian for such a child. The Special Rapporteur hopes that will end the discriminatory measures directed at women only, and urges the Sri Lankan authorities to consider fathers as per guardians of their own children.

68. The Special Rapporteur also urges the Sri Lankan authorities to ensure better protection of female domestic workers abroad. If properly implemented, the bilateral agreement with Saudi Arabia referred to above, which includes a standard contract that guarantees some rights for domestic workers, is a positive development in that respect. Similar agreements with other destination States should be negotiated and effectively implemented. Pre-departure training for domestic workers became compulsory in 1996, and a training certificate is mandatory in order to register with SLBFE. However, as domestic workers continue to be abused and exploited in destination States, the Special Rapporteur notes the need for enhanced training, particularly in order to empower women to leave such exploitative situations.

VI. Cross-cutting concerns

A. Families and children left behind

69. The Rata Viruwo programme, implemented by SLBFE, is aimed at ensuring sustainable development practices in favour of migrant workers and their family members. There is a housing programme whereby loans are given to construct houses, and there are also scholarships provided to children of migrant workers, as well as singing, dancing and arts competitions. However, while some studies show that migration of parents has a positive impact on children's education due to the increased ability to pay education costs, migration can also have negative consequences for those left behind, particularly children. The Special Rapporteur heard reports of how the absence of their parents can lead to disruption of children's education, neglect, abuse and exploitation, including sexual abuse of girls. Sometimes the oldest daughter in the family will be tasked with responsibility for the household, and will stop going to school. Some children also face alcohol abuse, child labour and early marriage. The Special Rapporteur urges the Sri Lankan authorities to enhance the attention given to the protection of families and children left behind, particularly in order to prevent child abuse and to ensure children's access to education. Denying mothers the right to migrate is not the solution.

B. Irregular migration from Sri Lanka

70. Attempting to leave Sri Lanka irregularly is a criminal offence, and Sri Lankans who try to migrate irregularly by boat, mainly to Australia, are often intercepted by the Sri Lankan authorities. Sri Lanka has entered into a readmission agreement with Australia, and the navy and coastguards are working to deter irregular migration by boat. Irregular migration from Sri Lanka is punishable by no less than one year of imprisonment, according to the Immigrants and Emigrants Act. The Sri Lankan authorities assured the Special Rapporteur that no penalty is imposed on those persons, as they are seen as victims of smugglers, and the only criminal action taken is against the smugglers. However, that contradicts reports provided to the Special Rapporteur, as well as statements by Sri Lankan officials to the media, such as that those returned would be charged with leaving the country illegally and those found guilty would face "rigorous imprisonment".[9] The Special Rapporteur strongly urges the Government to decriminalize irregular migration, as it should only be considered an administrative offence, and persons attempting to migrate irregularly should not be imprisoned.

C. Migration to Sri Lanka

71. While the Special Rapporteur's visit was mainly focused on migration from Sri Lanka, he also looked into migration to Sri Lanka and, particularly, the detention of migrants in an irregular situation. He visited Mirihana detention centre for migrants, with 68 detainees (58 men, 5 women, 5 children) and Boosa prison, with 11 migrant detainees, who were separated from the other detainees, held under anti-terrorism legislation. Ninety per cent of the migrant detainees were awaiting deportation, while the rest were waiting for their immigration rule violations to be resolved. The Special Rapporteur deeply regrets the policy of mandatory administrative detention of irregular migrants, with no individual assessment, no maximum time limit, no alternatives to detention, and the detention of

[9] Available from www.bbc.com/news/world-asia-28193492.

families with children. The Special Rapporteur was informed that irregular migrants are kept in detention until they leave the country, and they have to come up with the money to buy aeroplane tickets themselves. In the Mirihana detention centre, he met five children who had stayed there with their families for as long as two years, with no access to education, in violation of the Convention on the Rights of the Child, including the principle of the best interests of the child. The detainees at Boosa prison were kept under maximum security restrictions, with no access to mobile phones or the Internet.

72. The Special Rapporteur also deeply regrets that the Constitution of Sri Lanka guarantees certain rights, including protection against discrimination and the right of peaceful assembly, freedom of association and freedom to form and join a trade union, to citizens only, in violation of key international human rights law guarantees. He also regrets that there is no law protecting migrants in Sri Lanka.

D. Cooperation with civil society organizations

73. The Special Rapporteur heard reports of a shrinking democratic space for civil society organizations in Sri Lanka. He regrets the lack of trust between the Government and civil society organizations and urges the Government to reach out to such organizations and fully include them in its migration-related work, including the development of the new Employment Migration Authority Act and the conclusion of new bilateral agreements with destination States. Civil society organizations expressed to the Special Rapporteur a wish to be included in strategic discussions with the Government, rather than only in those on technical cooperation. The Special Rapporteur also heard concerns that the creation of the Rata Viruwo Foundation might lead to the exclusion of civil society organizations in migration-related discussions.

VII. Conclusions and recommendations

74. **The Special Rapporteur welcomes the efforts undertaken by the Sri Lankan authorities to regulate labour migration and protect the rights of its citizens migrating abroad, but notes the need to fully implement a human rights approach in that respect.**

75. **While migration plays a key role in the economic development of Sri Lanka, many Sri Lankan migrants experience abuse and exploitation, which often begins during the recruitment process. The Special Rapporteur understands the importance of remittances to the Sri Lankan economy, but he insists that this should not trump the rights of migrants. It is therefore important to make sure attention is paid to the protection of migrants, not just the promotion of migration. More focus could be placed on creating jobs in Sri Lanka, rather than focusing mainly on promoting labour migration, thus training people to leave the country. The creation of income-generating opportunities in Sri Lanka, especially for women, youth and minorities, including in rural areas, would contribute to ensuring that migration is a choice, rather than a necessity. At the same time, Sri Lankans who wish to migrate have the right to do so; leaving any country including one's own is a human right. This right applies equally to men and women.**

76. **The Special Rapporteur notes that there are some good policies in place, which, if they are implemented effectively, could potentially prevent some of the abuse that migrants currently experience during the migration process. There is also a need for strong rights-based legislation and enforceable agreements with all destination States.**

A. Recommendations to the Government of Sri Lanka

77. **In light of the information received and the concerns expressed, the Special Rapporteur wishes to propose the following recommendations to the Government of Sri Lanka. He urges the Government to consider these recommendations seriously and to implement them in cooperation with all relevant stakeholders, including the United Nations country team and civil society organizations. Technical cooperation for the implementation of recommendations could be sought from ILO, which has indicated its willingness to provide assistance to implement the Special Rapporteur's recommendations.**

78. **The Special Rapporteur recommends that the Government:**

1. Normative and institutional framework for the protection of the human rights of migrants

(a) Ratify ILO Conventions No. 97 concerning Migration for Employment (Revised 1949), No. 143 (1975) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, No. 181 (1997) concerning Private Employment Agencies, and No. 189 (2011) concerning decent work for domestic workers;

(b) Ensure that Sri Lankan legislation, including the draft Employment Migration Authority Act, is fully in line with international human rights standards, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;

(c) Fully implement the concluding observations adopted in 2009 by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, and make the declarations provided for in articles 76 and 77 of the Convention recognizing the competence of the Committee to receive communications from States parties and individuals; and accept the jurisdiction of all treaty bodies to hear individual complaints about the implementation of the human rights treaties to which Sri Lanka is a party;

(d) Promote bilateral, regional and international cooperation in the field of migration with destination States; seize the opportunity as the current Chair of the Colombo Process to enhance cooperation among countries of origin; and continue working with the Abu Dhabi Dialogue and its member States, pushing for a binding, unified work contract based on international human rights and labour standards;

(e) Ensure that the new Employment Migration Authority Act provides a proper delineation of the Authority's functions, that it ensures a balanced representation on the Board of Management of the Sri Lanka Bureau of Foreign Employment, including of workers, that it does not impose undue restrictions on the right to leave Sri Lanka and that it includes strong human rights protection for all migrants; and ensure interministerial coordination for the implementation of the Act.

(f) Strengthen the independence of the Sri Lankan Human Rights Commission, including in relation to the appointment process for its commissioners, provide it with adequate resources, systematically consult it on all migration issues with human rights implications, and implement its recommendations, inter alia in relation to labour migration from Sri Lanka and the detention of migrants in Sri Lanka;

(g) Involve all relevant stakeholders in all policy and service delivery issues concerning migrants, including trade unions and civil society organizations working for the human rights of migrants or constituted by migrants and returnees;

2. The recruitment process

(h) Undertake all the necessary steps to prevent the exploitation and abuse of migrants and to protect their rights during the recruitment stage, while they are in service in the destination country and upon their return to Sri Lanka;

(i) Ensure full implementation of, and make legally binding, the Code of Ethical Conduct for Licensed Foreign Employment Agencies, involving all relevant stakeholders;

(j) Enhance the regulation and monitoring of the recruitment industry, by: putting in place a comprehensive recruitment policy with high standards; ensuring that recruitment agencies improve the services they offer and holding them accountable for the non-execution of their duties; and regulating irregular sub-agents/brokers and sanctioning unlicensed agencies;

(k) Make licensed recruitment agencies more easily accessible in order to reduce informal networks and reliance on brokers, including in rural districts;

(l) Ensure the full transparency of the Workers Welfare Fund of the Sri Lanka Bureau of Foreign Employment (SLBFE), including with regard to the amount of money available and how it is spent;

(m) Abolish the payment of a motivational fee prior to leaving Sri Lanka, which may lead to debt bondage, making it difficult or impossible for a Sri Lankan worker to leave an abusive employer;

(n) Provide SLBFE with more resources in order to enable it to deal more effectively with complaints made by migrants, and enhance the legal assistance opportunities to help migrants pursue claims; ensure that returned migrants obtain appropriate redress, including financial compensation; prosecute perpetrators of violations under the Penal Code; and create alternative livelihood opportunities or skills development for migrants upon their return to Sri Lanka;

(o) Abolish recruitment fees for migrants and, in the meantime, reduce costs for migrants, including illegally high fees charged by some recruitment agencies and sub-agents/brokers;

(p) Enhance and improve pre-departure training and information in order to promote informed decision-making and enhance the skill levels of prospective migrants, including language skills and general education levels. Migrants should be empowered to know their rights and how to claim them, including by providing them with information on the local culture and lifestyle in the destination country and on important legislation there, which may be very different from those in Sri Lanka;

(q) Ensure that migrants are properly informed about the migration process and, in particular, ensure that employment contracts signed by migrants are always written in a language that they can read and understand;

(r) Refrain from sending migrants from Sri Lanka to countries where the legal and institutional framework necessary to guarantee the protection of their rights is not in place. This must include domestic workers, who are often excluded from labour laws;

(s) Make the protection of migrants a priority concern for Sri Lankan diplomatic missions in destination States; and strengthen the welfare services and consular assistance provided to Sri Lankan migrants in destination States, ensuring that diplomatic missions are adequately staffed and that staff are properly trained to deal with all issues faced by migrant workers. Diplomatic missions in destination States should play a more proactive role in protecting their own nationals against abuse and be properly equipped to provide assistance to Sri Lankans in need. Diplomatic missions should have female officers to deal with cases of sexual abuse, provide a local 24/7 hotline free of charge, establish a roster of competent local lawyers able to help Sri Lankan migrants with legal issues, and conduct frequent visits to migrant detention centres;

(t) Facilitate the repatriation of migrants in need, including those who have escaped from abusive employers or have ended up in an irregular situation, in detention or elsewhere;

(u) Establish a sustainable reintegration policy and enhance the services provided for the reintegration of returned migrants, including psychosocial services and livelihood opportunities, particularly for those who have experienced abuse during their migration process;

(v) Conduct independent autopsies on the bodies of all Sri Lankans who die abroad, and give family members quick access to the results;

(w) Enhance cooperation with destination States to prevent violations such as contract substitution, the confiscation of passports, the non-payment of wages, and abuse and exploitation;

(x) Negotiate with all destination States binding bilateral agreements providing for the protection of the human rights of migrants, and work together with destination States to ensure that illegal recruitment fees are not charged and that employment contracts signed in Sri Lanka are not replaced upon arrival by less favourable ones. That could be achieved by adopting a uniform model contract for all workers, including domestic workers, which is already being discussed in the Colombo Process. Such a model contract, to be included in bilateral agreements with all destination States, should ensure respect for and the protection of the human rights of migrants, including labour rights, with terms and conditions clearly stated. Labour contracts based on such a model should set out the job description, the agreed salary, working and living conditions, and effective recourse and remedies;

(y) Monitor the enforcement of bilateral agreements effectively, and ensure that all bilateral agreements and memorandums of understanding signed with destination States are made public, ensuring transparency and the monitoring of their implementation;

3. Women migrants and domestic workers

(z) Establish a standard contract for domestic workers, to be included in all bilateral agreements, which should include provisions on, inter alia, wages, working hours, working conditions, overtime pay, annual leave and effective remedies, as set out in ILO Convention No. 189 (2011) concerning decent work for domestic workers;

(aa) Abolish the financial incentives given to prospective domestic workers, which may be used to coerce them to migrate;

(bb) Establish a reference wage for domestic workers, reflective of skills and experience, which should apply to all workers in all destination States and be included in bilateral agreements;

(cc) Withdraw the Ministry of Foreign Employment Promotion and Welfare circular issued in January 2014, to respect women's freedom of movement;

(dd) Enhance pre-departure training for domestic workers, particularly focusing on language skills and information on their rights and how to claim those rights; continue and expand training programmes for women wishing to migrate to work as service providers, with the aim of reducing the number of Sri Lankan women migrating as domestic workers;

4. Cross-cutting concerns

(ee) Conduct a thorough study of the root causes of migration and its social consequences, including for families and children left behind, and enhance efforts to protect the children of migrants from abuse and exploitation, ensure their access to education and prevent early marriages;

(ff) Decriminalize irregular departures from Sri Lanka, as irregular migration should only be seen as an administrative offence; and refrain from detaining returned Sri Lankans who have migrated irregularly;

(gg) Detain migrants in an irregular situation in Sri Lanka only as a measure of last resort, for as short a period as possible, and systematically apply alternatives to detention, particularly for families and children, who should never be detained; in that respect, consider the recommendations made by the Special Rapporteur in his report on the detention of migrants in an irregular situation and alternatives to detention (A/HRC/20/24);

(hh) Ensure that all persons, regardless of citizenship or migration status, enjoy the rights provided for in the Constitution of Sri Lanka without any discrimination, in accordance with international human rights law;

(ii) Enhance cooperation with civil society organizations working on migration-related issues, and include them in all relevant discussions.

B. Recommendations to destination States

79. The Special Rapporteur recommends that destination States:

(a) Regulate and monitor all recruitment agencies operating in their territory in order to guarantee ethical recruitment in compliance with international human rights and labour standards, and impose sanctions on those who violate such regulations;

(b) Ensure that contracts are respected, and undertake all the necessary efforts to prevent contract substitution, in cooperation with the Sri Lankan authorities;

(c) Investigate and prosecute effectively all cases of exploitation and abuse of migrants;

(d) Ban recruitment fees for migrants and the confiscation of their passports, and sanction violations effectively;

(e) Abolish sponsorship systems which tie migrants to their employer, thus rendering them vulnerable to abuse and exploitation;

(f) Detain migrants in an irregular situation only as a measure of last resort, for as short a period as possible, systematically apply alternatives to detention, refrain

from detaining children and families, and give particular attention to supporting migrants who have escaped from abusive employers;

(g) Ensure the availability of complaint and redress mechanisms, legal aid and interpreters for migrants;

(h) Ratify the core United Nations human rights treaties, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the relevant ILO conventions.